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No. 12,953

**United States Court of Appeals
For the Ninth Circuit**

NANCY ANN STORYBOOK DOLLS, INC.

(a corporation),

Appellant,

vs.

DOLLCRAFT COMPANY, a corporation;

LESTER F. HINZ and ROBERT E. KERR,

Appellees.

BRIEF FOR APPELLANT.

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United States Court of Appeals For the Ninth Circuit

NANCY ANN STORYBOOK DOLLS, INC.

(a corporation),

Appellant,

vs.

DOLLCRAFT COMPANY, a corporation;

LESTER F. HINZ and ROBERT E. KERR,

Appellees.

BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal from the judgment of the United States District Court, Northern District of California, Southern Division, on an action involving the validity and infringement of a number of trade-marks registered by the Commissioner of Patents under the provisions of the Trade-Mark Act of February 20, 1905, U.S.C. Title 15.

The action was initiated by appellant seeking a declaratory judgment under the provisions of U.S.C. Title 28, Section 2201.

The issues of validity and infringement arose under the trade-mark laws of the United States, U.S.C. Title 15, Chapter 22. Original jurisdiction is conferred upon the United States District Court, and appellate

jurisdiction upon the United States Court of Appeals, by U.S.C. Title 15, Section 1121.

Jurisdiction is alleged in appellees' complaint, Section III (R. 4); and in appellant's answer, Section 3 (R. 56), and in its counterclaim, Section V (R. 64).

STATEMENT OF CASE.

Appellant manufactures and sells dressed dolls and is the owner of numerous trade-marks which it applies to its doll products and which are duly registered in the United States Patent Office, including the following trade-marks herein involved:

"Red Riding Hood"

Registration No. 420,007, March 26, 1946

"Little Miss Muffett"

Registration No. 432,208, August 26, 1947

"Little Bo-Peep"

Registration No. 395,454, May 26, 1942

"Mistress Mary"

Registration No. 404,576, December 7, 1943

"Little Miss Donnett"

Registration No. 404,586, December 7, 1943

"Curly Locks"

Registration No. 404,581, December 7, 1943

"Goldilocks"

Registration No. 395,451, May 26, 1942

"June Girl"

Registration No. 403,261, September 14, 1943

"Storybook"

Registration No. 389,114, July 22, 1941

"Story"

Registration No. 525,896, June 6, 1950

"Fairyland"

Registration No. 438,495, April 27, 1948

"Sugar and Spice"

Registration No. 403,240, September 14, 1943

Appellee Robert E. Kerr was formerly an employee of appellant, and appellee Lester F. Hinz manufactured and supplied to appellant, on appellant's specification, doll bodies which appellant decorated and dressed in the manufacture of its doll products.

Appellee Dollcraft Company is dominated by appellees Kerr and Hinz; and is engaged in the manufacture of dressed dolls of a generally similar and competing type.

Appellees have applied to various doll products manufactured and sold by them trade-marks identical with those previously adopted, used and registered by appellant, including those above listed.

As owner and registrant of the above listed trade-marks, appellant notified appellee Dollcraft Company, and various of its customers, of its and their infringement of appellant's trade-mark rights.

Thereupon, appellee Dollcraft Company immediately filed its complaint (R. 3-17) seeking to restrain appellant from the enforcement of its trade-mark rights; and asking the trial Court to declare appellant's listed registrations invalid.

Appellant duly filed its counterclaim alleging infringement by appellees of its registered trade-marks; and also alleging unfair competition with respect thereto.

Appellees Kerr and Hinz were joined as counter-defendants because of their previous association with appellant's organization, and because of their knowledge of its trade-mark rights. Their subsequent

motion to dismiss the counterclaim, as to them, was denied. (R. 78.)

The trial Court (R. 126) held valid and infringed appellant's trade-marks "Sugar and Spice", Registration No. 403,240, and "Fairyland", Registration No. 438,495; and directed that a writ of injunction be issued restraining appellees from further infringing said marks. From that judgment, appellees have not appealed.

As to the other trade-marks in issue, namely:

"Red Riding Hood"

Registration No. 420,007, March 26, 1946

"Little Miss Muffett"

Registration No. 432,208, August 26, 1947

"Little Bo-Peep"

Registration No. 395,454, May 26, 1942

"Miss Mary"

Registration No. 404,576, December 7, 1943

"Little Miss Donnett"

Registration No. 404,586, December 7, 1943

"Curly Locks"

Registration No. 404,581, December 7, 1943

"Goldilocks"

Registration No. 395,451, May 26, 1942

"June Girl"

Registration No. 403,261, September 14, 1943

"Storybook"

Registration No. 389,114, July 22, 1941

"Story"

Registration No. 525,896, June 6, 1950

the trial Court held (R. 126) the registrations invalid and directed that the same be cancelled. The Court further held, in substance, that appellees had not infringed any trade-mark rights of appellant in those trade-marks; and ordered (R. 127) that appellant be

restrained from interfering with the use of said marks by appellees. From that portion of the judgment appellant has appealed.

THE ISSUES.

The principal issues here involved are:

(a) Were appellant's trade-marks: "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep," "Mistress Mary," "Little Miss Donnett," "Curly Locks," "Goldilocks," "June Girl," "Storybook," and "Story," validly granted?

(b) If validly granted, have those trade-marks been infringed by appellees, or any of them?

(c) Regardless of validity, has appellees' use of appellant's trade-marks, upon goods of the same character, constituted unfair competition with appellant?

These and other issues are included in the concise statement of defendant-appellant's points on appeal pursuant to F. R. C. P. 75(d) (R. 452-6), which are:

1. The United States District Court erred in holding invalid and in ordering the cancellation of appellant's registration of the trade-marks:

No. 389114—"Storybook"

No. 395451—"Goldilocks"

No. 395454—"Little Bo-Peep"

No. 403261—"June Girl"

No. 404576—"Mistress Mary"

No. 404581—"Curly Locks"

No. 404586—"Little Miss Donnett"

No. 420077—"Red Riding Hood"

No. 432208—"Little Miss Muffett"

No. 525896—"Story"

2. The United States District Court erred in holding that appellant's trade-marks listed under numbered Paragraph 1 above were not validly registered by the United States Patent Office.

3. The United States District Court erred in failing to hold that the trade-marks designated under numbered Paragraph 1 above were validly registered by the United States Patent Office.

4. The United States District Court erred in failing to hold that the trade-marks designated under numbered Paragraph 1 above have been infringed by appellees and each of them.

5. The United States District Court erred in failing to rule that the individual defendants Lester E. Hinz and Robert E. Kerr are jointly and severally liable for infringement of appellant's trade-mark rights in the registered trade-marks involved in the above-designated action.

6. The United States District Court erred in failing to award to appellant-counter-complainant damages, costs, expenses and attorney fees in the above entitled action.

7. The United States District Court erred in awarding to appellee its costs and expenses in the above entitled action.

8. The United States District Court erred in failing to rule that each and all of appellant's trade-marks involved in the above entitled action are valid, and that the same have been infringed by defendants; and in failing to award to appellant: damages for past infringement; an injunction restraining future infringement of those marks held invalid; and its costs, expenses and attorney fees in the proceedings.

Appellant relies upon each and all of the points listed.

SUMMARY OF ARGUMENT.

Appellant's position upon the foregoing issues may be briefly summarized as follows:

Appellant for many years has used upon its goods the trade-marks herein involved. The marks have been duly and validly registered by the Commissioner of Patents under the trade-mark statutes of the United States. Each of the registrations carries a strong presumption of validity which appellee has wholly failed to overcome.

Moreover, by reason of long and exclusive use by appellant upon its doll products, the trade-marks here involved have acquired a distinctive secondary meaning, identifying the goods upon which they variously appear as goods produced and sold by appellant.

Appellees' use of identical marks upon competitive goods of the same character constitutes infringement of appellant's statutory rights in its several trade-

marks; and additionally involves unfair competition with respect to rights vested in appellant by reason of its long and exclusive use of its trade-marks throughout the United States and in export trade.

Appellees' use of appellant's trade-marks was begun with full knowledge of appellant's use and registration of its trade-marks and was a deliberate effort to pirate the property of appellant, and to prey upon the good will established by appellant in connection therewith. Appellees' action to have appellant's trade-mark registrations declared invalid is a studied effort to destroy appellant's property rights and to unlawfully appropriate trade-marks acquired, owned and registered by appellant.

ARGUMENT.

(a) INTRODUCTION.

The normal position of the parties as plaintiffs and defendants has been reversed in this case by reason of the fact that the action was brought by Dolleraft Co., asking a declaratory judgment under Title 28 U.S.C. Sec. 2201.

Actually the case involves primarily a simple claim for infringement of trade-marks and for unfair competition, asserted by Nancy Ann Storybook Dolls, Inc., and the ordinary defenses of invalidity and non-infringement interposed by Dolleraft Co. and the individual counter defendants Robert E. Kerr and Lester F. Hinz. In simple language, appellant Nancy Ann Storybook Dolls, Inc., has charged in-

fringement of its trade-mark rights. Dollcraft Co., and the individual appellees Hinz and Kerr, assert that the Nancy Ann trade-marks here involved are not valid and cannot function as true trade-marks.

Because Dollcraft Co. assumed the position of plaintiff, the case takes on the additional aspect of a deliberately planned attack upon valuable trade-mark rights of Nancy Ann Storybook Dolls, Inc. While only a few trade-mark registrations are actually attacked in the present action, the principles involved extend not only to many more of the trade-mark registrations of Nancy Ann Storybook Dolls, Inc., but to countless registrations and long established trade-mark rights of other manufacturers not only of dolls, but of numerous other lines of manufacture. If Dollcraft Co. is permitted to succeed in this vicious attack, it will indirectly affect a large percentage of the trade-marks heretofore registered by the patent office under the trade-mark statutes in many lines of business.

Appellees have heretofore grounded their case, both in attack and in defense, upon the premise that the Nancy Ann organization has acquired its trade-marks by some improper or unlawful means. That premise is wholly unsupported by the facts, the law, and the equities of the case. In fact it will be demonstrated that appellees' position from the start has been a sham and a pretense; and that, by their own acts, appellees are estopped to deny the validity of the valued trade-marks of the Nancy Ann organization.

(b) **THE TRADE-MARKS HAVE BEEN VALIDLY REGISTERED.**

The trade-marks of Nancy Ann Storybook Dolls, Inc. herein involved were duly and properly registered by the Patent Office under the provisions of the trade-mark Act of February 20, 1905. Under the Act, the Patent Office is the administrative department to which has been given the duty to consider and pass upon all applications for registration of trade-marks which may be submitted to it.

“U. S. C., title 15, sec. 81.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States, or resides in or is located in any foreign country, which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration for such trade-mark by complying with the following requirements: First, by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, * * *”

Each application for registration of trade-mark is subjected to the scrutiny of experts who are specially trained and qualified to pass upon the question of registerability. Each and all of the technical and statutory bars, such as descriptiveness, misdescriptiveness and geographic significance, as provided by Sec. 5 of the Act, are considered; and a thorough

search of prior registrations is made to determine whether or not the mark or one confusingly similar to it has been registered for goods of the same descriptive properties.

When and if the Patent Office Examiner determines that a trade-mark is registerable, the mark is published in the Official Gazette of the U. S. Patent Office. During a period of 30 days immediately following the publication anyone may oppose the registration. In that regard the Act of February 20, 1905 provides:

“Sec. 6, U. S. C., title 15, sec. 86. That on the filing of an application for registration of a trade-mark which complies with the requirements of this act, and the payment of the fees herein provided for, the Commissioner of Patents shall cause an examination thereof to be made; and if on such examination it shall appear that the applicant is entitled to have his trade-mark registered under the provisions of this act, the commissioner shall cause the mark to be published at least once in the Official Gazette of the Patent Office. Any person who believes he would be damaged by the registration of a mark may oppose the same by filing notice of opposition, stating the grounds therefor, in the Patent Office within thirty days after the publication of the mark sought to be registered, which said notice of opposition shall be verified by the person filing the same before one of the officers mentioned in section two of this act. An opposition may be filed by a duly authorized attorney, but such opposi-

As amended by act
of March 2, 1907.

tion shall be null and void unless verified by the opposer within a reasonable time after such filing. If no notice of opposition is filed within said time, the commissioner shall issue a certificate of registration therefor, as hereinafter provided for. If one examination an application is refused, the commissioner shall notify the applicant, giving him his reasons therefor."

If no opposition is filed, the trade-mark is officially registered, and a certificate of registration is issued. When so registered the registration carries a strong presumption of validity, as the considered act of an administrative agency of our government. Any one attacking the validity of such a registration assumes a heavy burden of proof. For example, it has been held:

"Registration of a trade mark by the Patent Office gives rise to a presumption of validity. *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, 254 Fed. 550. While claiming validity for 447, defendant, with an abundance of caution contends 'Windbreaker' is generic and not subject to registration. Obviously this contention is directed at plaintiff's claim for damages. If defendant were seriously opposing registration by the Patent Office in the case at bar a large part of the record would not have been devoted to defendant's case tending to establish validity of the same mark for its own purposes. Hence I hold that defendant has not carried the burden required of it to overcome the presumption of validity." *John Rissman & Son v. Gordon & Ferguson, Inc.*, 78 U.S.P.Q. 322, D. C. Minn., March 12, 1948, Judge Donovan.

In this circuit it has been held:

“Where one claims ownership of a mark as against one who has registered the mark, the burden of proof is upon such claimant, in this case the plaintiff (Walter Baker & Co. v. Delapenha, 160 F. 747)” *Western Stove Company, Inc. v. Geo. V. Roper Corporation, et al.*, 80 U.S.P.Q. 393, D. C. Calif., January 24, 1949, Judge O'Connor.

To the same effect, see also:

Hemmeter Cigar Co. v. Congress Cigar Co., Inc., 118 F. (2d) 64, 49 U.S.P.Q. 122, 31 T. M. Rep. 182 (C.C.A. 6th Cir., 1941), holding that the registration of a trade-mark under the Act of 1905 is a recognition of its validity by the Patent Office and raises a presumption of validity;

House of Westmore, Inc. v. Denney, 151 F. (2d) 261, 66 U.S.P.Q. 373, 35 T. M. Rep. 318 (C.C.A. 3d Cir., 1945), holding that registration under the Act of 1905 is prima facie evidence of ownership of the trade-mark and enlarges the remedies available without registration;

Feil v. American Serum Co., 16 F. (2d) 88 (U.S.C.C.A. 8th Cir., 1926);

Weiner et al. v. National Tinsel Mfg. Co., 35 F.S. 771, 48 U.S.P.Q. 321, 31 T. M. Rep. 105 (D. C. Wis., 1940);

Barbasol Co v. Jacobs, 72 U.S.P.Q. 350 (C.C.A. 7, 1947);

Cridlebaugh v. Montgomery Ward & Co., Inc.,
72 U.S.P.Q. 135 (C.C.P.A., 1947);

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P.Q. 315 (C.C.P.A., 1949);

Permatex Corp. v. Detrex Corp., 81 U.S.P.Q.
257 (Com'r. Pats. 1949);

Lace Net Importing Co. Inc. v. Bondir, 81
U.S.P.Q. 546 (Com'r. Pats. 1949).

In the present case, each of the registrations in issue has successfully passed the scrutiny of the patent office; and has been duly registered. In only one instance ("Little Miss Muffet" Reg. No. 432,208) was an opposition filed. In that case the opposition was dismissed on the grounds that the goods of the respective parties were not of the same descriptive properties. Each of appellant's registrations carries the usual presumption of validity. No evidence has been presented to overcome that presumption.

(c) THE NANCY ANN TRADE-MARKS ARE NOT DESCRIPTIVE.

Several of the Nancy Ann trade-marks here involved have been selected from the field of nursery rhymes, fairy tales, storybooks and related sources. A number of other trade-marks owned and registered by the Nancy Ann organization, though not here involved, were derived from the same or similar sources. However, the number of marks so adopted, used and registered by the Nancy Ann organization during the past fifteen years, in all constitute only

an *infinitesimal part* of the limitless field of fanciful and fictitious characters from which such names and trade-marks may properly be selected for trade-mark use. Each was adopted in the utmost good faith; and appellant's rights have been long accepted and recognized in the trade.

The practice of adopting and registering such names as trade-marks for dolls and/or other products is in strict accordance with the law and the long established policy of the Patent Office. The Nancy Ann organization is not the first or the only manufacturer of dolls who has registered such trade-marks.

For example "Little Miss Muffett" was previously registered May 4, 1920, No. 130,857 by Pacific Novelty Company of New York as a trade-mark for Dolls. That company went out of business and the mark became abandoned. The Nancy Ann adoption and appellant's registration followed the abandonment of the mark by another; and registration was not effected until after the Pacific Novelty Co. registration expired.

A similar situation exists with respect to "Red Riding Hood". The mark "Little Red Riding Hood" was previously registered by Jeanette Doll Co. Inc. of New York, N. Y., No. 186,118, dated July 1, 1924, for Dolls. In this instance, Jeanette Doll Co. went out of business and abandoned the mark "Little Red Riding Hood". Upon an appropriate showing of those facts, the Patent Office

granted the Nancy Ann registration No. 420,077, for "Red Riding Hood", here involved.

As to "Little Miss Muffett" and "Little Red Riding Hood" the patent office officially determined back in 1920 and 1924 respectively that the marks *are registerable*; and that finding was reaffirmed when the Nancy Ann registrations No. 432,208 and No. 420,077 were granted. The adoption and registration by the Nancy Ann organization of these trade-marks, previously abandoned by others, is entirely proper and lawful, and is in accord with common practice.

Marks of comparable character have been registered by others for years; and such registrations are being granted by the Patent Office consistently at the present time. The following are illustrative:

<u>Mark</u>	<u>Number</u>	<u>Date</u>	<u>Registered</u>
Alice in Wonderland	304,488	July 11, 1933	Alexander Doll Co.
Lilliputian Bazaar	232,557	Sept. 13, 1927	Best & Co., Inc.
Dottie Dimples	422,827	Aug. 13, 1946	Hollywood Doll Co.
Miss Teeter- Totter	422,832	Aug. 13, 1946	Hollywood Doll Co.
Punchinello	425,857	Dec. 3, 1946	Hollywood Doll Co.
Fantasy Children by Sturgeon	441,998	Feb. 8, 1949	Blanche M. Sturgeon
Sherry-Ann	443,672	Jan. 10, 1950	International Doll Co.
Peg O' My Heart	519,641	Jan. 10, 1950	Kerr & Hinz Doll Co.
Babyland	520,183	Jan. 24, 1950	M. & S. Doll Co.
Betty Burp	520,240	Jan. 24, 1950	Ideal Novelty & Toy Co.
Marcie	521,415	Feb. 28, 1950	Amram Haddad
Champ	521,613	Feb. 28, 1950	Cameo Doll Products Co.
Chatterbox	523,219	Mar. 28, 1950	Sayco Doll Corp.

Copies of the above noted registrations were filed with the trial Court. The registrations are matters of official record in the patent office, of which this Court may take judicial notice. The number of such registrations cited could be multiplied many times, but would be merely cumulative.

The proviso of Section 5 of the Act of Feb. 1905 relating to descriptiveness is:

“Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual, *or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods,* or merely a geographical name or term, shall be registered under the terms of this Act:”

Obviously the Patent Office Examiners, experts in the field, did not regard the marks as descriptive when any of the above listed marks were registered, or when any of the Nancy Ann marks here involved were registered. Their expert opinion over a long period of time has determined the official rulings of the Patent Office, and the formal registration of trade-marks. Their opinion and findings are entitled to a high degree of respect.

“Generally speaking judicial review of administrative orders is limited to determining whether errors of law have been committed.” *Scripps-Howard Radio v. Commission*, 316 U.S. 4, 10 (1942).

“To state the matter very broadly judicial review is generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are said to be matters of administrative judgment to be determined exclusively by the agency. But the narrow inquiry into the agency’s authority to act as it did covers a wide field.” *Final Rep. Attorney General’s Committee on Administrative Procedure* (1941), page 87, C.C. H., 1511, page 1673.

“To hold that there was an invalid delegation of judicial power would be to turn back the clock on at least a half century of administrative law.” *Sunshine Coal Co. v. Adkins*, 310 U. S. 381 (1940).

“We give great weight to an administrative interpretation long and consistently followed, particularly when the Congress, presumably with that construction in mind, has reenacted the statute without change.” *Koshland v. Helvering*, 298 U. S. 441 (1936).

“Congress has entrusted the administration of the Act to the Commission, not to the Courts. Apart from the requirements of judicial review it is not for us to advise the Commission how to discharge its function.” *Power Commission v. Hope Gas Company*, 320 U. S. 591 (1944).

The marks of course have a *suggestive* significance but it has always been recognized that there is a clear distinction between marks which are objectionably “*descriptive*” and those which are merely “*suggestive*”

tive". Marks which are merely suggestive have been uniformly accepted and registered as valid trade-marks.

It is difficult to understand how anyone can in good faith argue that any of the marks here involved are descriptive of dolls.

To be "descriptive" within the meaning of the statute so as to be barred from registration, a mark must describe either *the goods* upon which the mark is used, or the *character* or *quality* of such goods.

To be descriptive of the goods, the mark must describe the goods themselves with reference to its kind, composition, physical properties or species. For example "White Wash" for calcimine, or "Vitrified" for glazed tile.

To be descriptive of the character of the goods, the mark must identify the goods with reference to shape, or the mechanical, physical or chemical properties of the goods; as "Automatic" for self actuating mechanism, "Water Proof" for a rain coat, or "Salted" for crackers.

To be descriptive of quality, the term must identify the goods with relation to the grade or excellence of the goods, as for example "Everwear" for hosiery, or "Super Shine" for shoe polish.

None of the Nancy Ann trade-marks here involved are objectionable in any of these respects.

The courts have consistently recognized the distinction between *suggestive* marks, and those which

are *descriptive*; and have uniformly held valid those trademarks which are *suggestive* and *not* merely *descriptive*.

The following quotations from reported decisions are illustrative of the general attitude of the Courts:

"I find that defendants' use of 'Bonnie Lassie' is an infringement of plaintiff's trademark 'Hoot Lass' BONNIE, and that defendants by their use of the words and of the design of the Scotch dancing girl in conjunction with them have unfairly competed, notwithstanding plaintiff's mark and design have heretofore been used on ladies' and misses' coats and suits, and defendants' on sweaters.

"The trade-mark 'Hoot Lass' BONNIE is not descriptive of anything with which it is used, but is, in my judgment, both a distinctive and arbitrary mark. It is not descriptive of the characteristics of the goods, or of their quality or ingredients. It is a fanciful name, obviously adopted without any other thought than as being peculiarly significant and suggestive of plaintiff's goods." *Lou Schneider, Inc. v. Carl Gutmen & Co.*, 70 U.S.P.Q. 490 at 492.

"If the words are merely suggestive of the character of the goods or the properties which the users of the mark wish the public to attribute to them and are not merely descriptive, the mark will be good. *Reardon Laboratories v. B. & B. Exterminators*, 71 F. 2d 515, 517 (22 U.S.P.Q. 22, 23-24). See also *Holeproof Hosiery Co. v. Wallach Bros.*, 172 F. 859; *Globe-Wernicke Co. v. Brown*, 121 F. 185." *Hygienic*

Products Co. v. Judson Dunaway Corp., 81 U.S.P.Q. 16 at 22.

“At the same time, I am of the view that plaintiff’s mark is not a mere combination of descriptive words, but a combination which has enough deviation from the common use of words and parts of words to make its registration as a trade-mark valid.” *Vita-Var Corp. v. Alumatone Corp.*, 81 U.S.P.Q. 330 at 331.

“One of defendants’ contentions here is that plaintiff’s trade-mark is invalid. But as a name for a magazine catering to girls from 13 to 18 years of age, we agree with the trial court that ‘Seventeen’ is a fanciful or suggestive term rather than a commercially descriptive one. Its value in its registered use would seem to lie in its symbolic appeal and not in any indication of particular product. Cf. *San Francisco Ass’n. for the Blind v. Industrial Aid for the Blind*, 8 Cir., 152 F. 2d 532, 533, 534 (68 U.S.P.Q. 59, 60). It can hardly be said, within the language of the Trade Mark Act of 1905, as amended, to be ‘merely * * * descriptive of the goods with which they are used, or of the character or quality of such goods’”. *Hanson v. Triangle Publications, Inc.*, 74 U.S.P.Q. 280 at 281-2.

“It is true that the trade-mark ‘Blind-Craft’ suggests that an article so marked was made by blind workers. The term ‘Blindcraft’, however, is not specifically descriptive of any of the goods produced by the plaintiff or by the defendant, or of the character or quality of such goods. The label ‘Blindcraft’ upon a broom does not describe the broom. With respect to it, the mark is a fanciful, nondescriptive term.” *San Fran-*

cisco Association v. Industrial Aid for Blind, Inc., 68 U.S.P.Q. 59 at 60.

“Defendant’s first contention is that plaintiff does not have a valid trade-mark in the word ‘Swooner’ for the sale of bobby socks and other feminine wearing apparel. By the terms of section 14201, Business and Professions Code, ‘A trade-mark may not consist of a designation * * * that relates only to * * * (b) The quality of the thing marked.’ Defendant contends that under this code provision plaintiff does not have a valid trade-mark in the designation ‘Swooner’ because such designation describes the class of trade for whom the goods are intended and therefore indicates the quality of the merchandise. There is no merit in this contention. The word ‘Swooner’ does not relate to the character or quality of the merchandise. It certainly does not indicate the type or grade of material from which a garment is made, nor does it describe the weave, pattern, form, color, length or size of a bobby sock or other feminine wearing apparel. The designation is more suggestive of style than quality.” *Cole of California, Inc. v. Grayson Shops, Inc.*, 68 U.S.P.Q. 337 at 339.

“Plaintiff has a mark which is arbitrary and not generic or descriptive of the class of goods to which applied and consequently acceptable as a valid trade-mark. While not descriptive, the mark is in a sense suggestive of the products, the producer of which it identifies.” *Trunz, Inc. v. Farmer Boy Corp. & Equipment Co., Inc.*, 78 U.S.P.Q. 31 at 33.

In asserting that the trade-mark registrations of Nancy Ann Storybook Dolls, Inc. are invalid, ap-

pellees have relied primarily upon dicta which counsel, in argument, has repeatedly quoted from the decisions of the Examiner of Interferences and the Assistant Commissioner of Patents in the case of *Nancy Ann Dressed Dolls* (Nancy Ann Storybook Dolls, Inc., assignee, substituted) *v. Ippolito*, 77 U.S.P.Q. 545. That case involves the trade-mark "Nursery Rhymes". The reliance by appellees upon those decisions is futile for the reason that the validity of an opposer's trade-mark registrations *cannot be attacked or passed upon* in the course of an opposition proceeding.

"(3) This raises an interesting situation in that the question of the validity of the registrations has been brought into this opposition proceeding and it is too well established to require the citation of authorities that the validity of an opposer's registration may not be questioned in an opposition proceeding." *de Botelho v. Babs Creations, Inc.*, 67 U.S.P.Q. 306 at 307.

"With reference to appellant's contention that appellee's mark is merely descriptive and, therefore, the latter may not intervene since the mark relied upon by it is not a mark 'owned and in use' as provided for in section 5 of the Trade Mark Act of 1905, the examiner held that *the validity of appellee's registered trade mark could not be challenged in an opposition proceeding*, citing *Englander, Etc. v. Continental Distilling Co.*, 25 C.C.P.A. (Patents) 1022, 95 F. 2d 320, 37 U.S.P.Q. 264, and cases therein cited and reviewed." *Van Pelt & Brown, Inc. v. John Wyeth & Bro., Inc.*, 73 U.S.P.Q. 408 at 409.

The comments of the Examiner of Interferences in the Nursery Rhymes case, also adopted by the Assistant Commissioner in affirming the decision of the Examiner are only the personal opinions of the individuals who prepared the decisions; and are simply dicta. Since the validity of the Opposer's (Nancy Ann Storybook Dolls, Inc.) trade-marks could not be attacked in the opposition proceeding, the volunteered opinions of the Examiner of Interferences or of the Assistant Commissioner, are of no legal consequence.

Even though the volunteered opinions of the Examiner and Assistant Commissioner were entitled to consideration; the decision of the Court of Customs and Patent Appeals clearly nullifies any weight which the opinion might otherwise carry. Thus, the Court in its majority opinion states:

“While we do not consider the mark ‘Nursery Rhymes’ *descriptive* of dolls generally, we do consider it highly suggestive of a class of dolls in particular. The suggestive mark ‘Nursery Rhymes’ is generic to the specific marks registered to appellee, each of which is individually suggestive of a segment of the group of which appellant’s contested mark is suggestive. It is apodictic, in our opinion, that confusion as to the origin of the goods of the parties would follow if registration were granted to appellant. ‘Boy Blue,’ ‘Little Miss Muffett,’ ‘To Market,’ ‘Polly Put Kettle On.’ to mention just a few of the registered marks of appellee hereinbefore set out, are certain ‘Nursery Rhymes.’

Clearly then, likelihood of confusion would follow upon the registration of 'Nursery Rhymes' to appellant with consequent damage to the appellee."

The *validity* of the Nancy Ann registrations was not an issue before the Court, and could not be passed upon. As to "Nursery Rhymes" the Court expressly held that the term is *not descriptive* of dolls. Only because the term is broadly applicable to the several dolls made and sold by Nancy Ann Storybook Dolls, Inc., under its trade-marks derived from the Nursery Rhymes, was the opposition sustained.

It is of course fundamental that an appellate tribunal may affirm a lower court ruling for reasons not advanced by the lower Court. An appellate Court may disapprove the grounds upon which a case is decided, and yet affirm the Judgment of the lower Court upon other grounds. In the "Nursery Rhymes" case, the above quoted portion of the decision clearly shows that the Court of Customs and Patent Appeals *did not affirm the ruling that "Nursery Rhymes" is not registerable on the ex parte grounds of descriptiveness*. On the contrary, the majority opinion ruled that "Nursery Rhymes" is *not descriptive*; and the decision of the Assistant Commissioner sustaining the opposition, and denying registration of the "Nursery Rhymes" mark, was obviously based only upon the grounds that the term "Nursery Rhymes" was aptly applicable to the Nancy Ann Storybook Dolls, Inc. products, and hence, could not be *registered* to Ippo-

lito without likelihood of causing confusion in the minds of the public. It is only because the Nancy Ann organization had been using its trade-marks derived from the Nursery Rhymes for many years before Ippolito began use of "Nursery Rhymes" that the Court denied registration of the mark by Ippolito. Had it not been for Nancy Ann's long use of marks such as "Little Miss Muffett", "Lucy Locket", "Little Bo Peep", and other marks derived from the nursery rhymes, the Court would undoubtedly have held with Judge O'Connell, who in his dissenting opinion said:

"The generic name or descriptive word applicable to the article here in issue is the term 'doll.' The term 'Nursery Rhymes' consists of words not primarily descriptive of dolls, but, when applied to dolls, they shed light upon the characteristics of the goods in a suggestive or figurative sense which is not merely descriptive of dolls within the purview of the statute. * * * The record discloses that the faces of appellee's dolls, in general, were very much alike and that the dolls of the 'Storybook Series' were alike except for costume. There is no evidence regarding the nature of the dolls sold by appellant other than the impression to be drawn from the term which he seeks to register. That term when used as a trade-mark obviously distinguishes appellant's goods from other goods of the same class sold by appellee, and under the authorities hereinbefore cited appellant was entitled to registration of his mark."

(d) APPELLANT'S TRADE-MARKS.

While each of the Nancy Ann registrations here involved must be separately considered, they may be treated in groups.

First, is the mark "*Storybook*". In its primary sense, the term "storybook" means exactly that—a storybook. By long use it has acquired a special trade-mark significance with reference to dolls, and in that connection has come to denote doll products made by the Nancy Ann organization. The mark is purely arbitrary and distinctive. It has no *descriptive* meaning with reference to the dolls themselves, or their character or quality. The mark has been duly registered by the Patent Office, and rests soundly upon the principle which the Court of Customs and Patent Appeals, as recently as June 30, 1950, has recognized in allowing registration of "Toyland", (*Ippolito v. Nancy Ann*, Opposition No. 24,875, Appeal Docket No. 5695), and in holding that "Nursery Rhymes" is *not descriptive* of dolls in general.

The trade-mark "Storybook" for dolls, is obviously infringed by the mark "Dolls with a Story". The connotation and thought suggestion is identical. The mark could only have been adopted by appellees (counterdefendants) for the purpose of causing confusion. That it has caused confusion is clearly evidenced by the Macy advertisement, Exhibit J and the Victorine Dress Shop advertisement, Exhibit K.

The registrations "Story" No. 525,896 and "Fairyl-land" No. 436,495 clearly rest on the same sound

basis. "Story" alone has been used less extensively than "Storybook", but it has been used and duly registered; and is obviously infringed by appellees' (counterdefendants') mark "Dolls with a Story", in which "Story" is the dominant word. Fairyland is purely arbitrary. In its primary sense, it means an imaginary realm inhabited by fairies. As a trademark it has long been used to identify a considerable group of the dolls made by the Nancy Ann organization. Both marks rest upon the principle on which the Court of Customs and Patent Appeals recently allowed registration of "Toyland"; and upon which the patent office has recently granted registration of "Babyland" (Reg. No. 520,183, dated January 24, 1950) for dolls. Valid registration of Fairyland has been recognized by the trial Court. Appellants' registration of "Storybook" and "Story" are similarly valid.

Second, the marks "Red Riding Hood", "Little Miss Muffet", "Mistress Mary", "Little Miss Donnet", "Curly Locks" and "Goldilocks" are derived from nursery rhymes or story books, but obviously describe neither the dolls themselves, their character, or their quality. The names are those of imaginary characters. The dolls are merely one artist's conception of how each imaginary character might appear. By long and extensive use, the marks have become associated with the products of the Nancy Ann organization and to the public indicate that the dolls were made by the Nancy Ann organization. To order a "Little Miss Muffet" or a "Curly Locks"

would mean nothing except for the trade significance which those terms have acquired. The term "Little Miss Muffet" in itself does not indicate whether the *goods* are dolls, clothing, or cottage cheese. As to the *character* of the goods, the mark certainly does not indicate whether the goods are paper, plastic or pot metal—large or small—dressed or undressed—candy or crystal. As to quality the mark does not indicate or suggest whether the products are penny paper cut outs, or costly hand made collector's items.

By no distortion of the language of the statute can any of this group of names be brought within terms which bar registration of terms *merely* descriptive of the goods, their character or their quality.

Since appellees admit use of precisely the same marks, infringement is self evident.

As a third group, "Sugar and Spice" and "June Girl" are even more clearly arbitrary and distinctive. No where in any of the nursery rhymes, fairy-tales or storybooks is there a character "Sugar and Spice" or "June Girl". The primary meanings of the terms are wholly unrelated to dolls, and neither term suggests any ascertainable kind, character or quality of goods, outside their primary meanings. The mark "Sugar and Spice" has been held valid by the trial Court.

"June Bride" obviously invades the field of "June Girl", as all brides are of course girls, and a June girl is still a June girl, whether a bride or not. Nothing but a planned raid on the Nancy Ann trade-

marks could prompt the copying of marks so fanciful as "Sugar and Spice". "June Girl" rests upon similar principles.

The courts have consistently found marks of comparable nature valid and infringed. For example:

"Sliced Animals" has been held to be a valid mark for a game or puzzle.

Selchow v. Baker, 93 N. Y. 53; Cox 690 (Ct. App. N. Y., 1883);

"Cookieland" has been held descriptive of cookies.

Loose-Wiles Biscuit Co. v. Johnson Educator Food Co., 343 O. G. 228, 10 F. (2d) 656 (App. D. C., 1925);

"Seventeen" is not descriptive of a magazine for young girls.

Triangle Publications, Inc. v. Rohrlich et al.,
Rosenbaum et al. v. Triangle Publications, Inc., 167 F. (2d) 969, 77 U.S.P.Q. 196 and 294, 38 T. M. Rep. 516 and 657. (C. C. A. 2d Cir., 1948);

"American Girl" has been held to be infringed by "American Lady".

Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 165 Fed. Rep. 413, 91 C. C. A. 363;
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 60 L. Ed.

"Chatterbox" has been held to be infringed by "Chatterbook".

Estes v. Leslie, 29 Fed. Rep. 91.

(e) BAD FAITH OF APPELLEES.

It has been noted that the normal position of the parties plaintiff and defendant has been reversed by reason of the fact that the infringers have employed the age-old device of striking first—in this instance by asking for declaratory relief. By assuming the role of an “injured party” Dollcraft Company and its officers Hinz and Kerr have sought to mask a planned effort to destroy valuable trade-mark rights of Nancy Ann Storybook Dolls, Inc., on a distorted theory which, if given effect, will destroy the trade-mark rights of hundreds of manufacturers of dolls and other products.

The position which appellees have taken has been a sham and a pretense, from the start.

In the first place, appellees have charged bad faith on the part of Nancy Ann Storybook Dolls, Inc. in securing its trade-marks and in charging infringement thereof. Yet the validity of the Nancy Ann registrations *was not* involved in the opposition proceedings and hence *could not be* impaired by the Examiner's volunteered comment.

“This Court should not be confused or misled by the numerous trade-mark opposition proceedings in the Patent Office involving defendant herein and cited to this Court by defendant's counsel during the oral argument. In no instance was the *validity* of any of defendant's trade-marks passed upon by the Patent Office in any of said Patent Office proceedings. The Patent Office *does not have jurisdiction to determine the validity of an opposer's trade-mark* in

an opposition proceeding. The only question involved so far as an opposer is concerned in an opposition proceeding is whether or not the opposer will be damaged if an applicant's trade-mark is registered." (Plaintiffs-Counterdefendants Opening Brief, pages 33 and 34.)

Secondly, while attacking the validity of the Nancy Ann Storybook Dolls, Inc. registration, appellees Kerr and Hinz (copartners in Kerr & Hinz Doll Company, and together controlling the Dollcraft Co. and directing its policies) have sought and secured registration of the term "Peg O' My Heart", for dolls and doll clothes, Registration No. 519,641, dated January 10, 1950, a copy of which was filed with the trial Court.

The well known name "Peg O' My Heart" is comparable in all respects to the names registered by Nancy Ann Storybook Dolls, Inc. and its predecessors; and by numerous other registrants as indicated by the annexed copies of trade-mark registrations. In making application for that registration, filed January 17, 1948, both Hinz and Kerr took the position, without question that they were entitled under the law to claim the right to register "Peg O' My Heart", the name of a character renowned in song and story, as a technical trade-mark for dolls and doll clothes. They sought, were granted, and accepted a Federal registration of that trade-mark. The doctrine is well established in law that knowledge of an agent is knowledge of a principal and therefore the knowledge of the use of this mark and the claim

of unqualified ownership of the mark as a technical trade-mark for dolls and doll clothes is chargeable to the corporation, Dollcraft Co., in view of the relationship of Kerr and Hinz to that corporation.

It is apparent that these people are now seeking to do a complete "about face" for obvious reasons in this suit, and have claimed in loud and vehement tones that a name such as this cannot function as a trade-mark. Equity frowns upon such tactics and the whole fabric of the defense becomes clear for what it is, a shabby attempt to invalidate the valued trade-marks of a successful competitor in order that the appellants may enrich themselves unjustly, when at the very same time they have followed the identical business policy of registering under the Federal law the same type of trade-mark for dolls and doll clothes. It is urged strongly that by reason of the act of Kerr and Hinz in claiming trade-mark rights in the name "Peg O' My Heart" for dolls and doll clothes and by reason of the securing of a Federal registration of this mark as a technical trade-mark, they and their company are completely estopped by such conduct to maintain now that the trade-marks of the appellant are not valid and infringed and that the Federal registrations for such marks were not granted properly.

(f) APPELLEES HAVE PLANNED AND PURSUED A DELIBERATE COURSE OF UNFAIR COMPETITION.

The record amply supports the charge of appellant that appellees have deliberately planned a course of unfair competition with Nancy Ann Storybook Dolls, Inc., for the double purpose of injuring Nancy Ann Storybook Dolls, Inc., and to unfairly benefit from the goodwill of the Nancy Ann organization.

Appellees have deliberately copied defendant's trade-marks; and have invaded the rights which defendant has acquired therein by long use in interstate and foreign commerce, and by registrations in the United States Patent Office. With countless names of fanciful and fictitious characters available for appropriation and use without conflict with others appellees chose to adopt a group of names and trade-marks which they well knew had been long previously adopted and registered by defendant counter-claimant.

Legal proof of the mental attitude of any of the officers and directors of appellee Dollcraft Co., is of course substantially impossible. The facts and circumstances of the case point with certainty to a planned program of sabotage, and unlawful appropriation of the rights of the Nancy Ann organization. Why else would Kerr and Hinz, both disgruntled at the termination of their relationships with the Nancy Ann organization, and probably instigated by their salesman Patterson (also a disgruntled ex-salesman for Nancy Ann), take control of a small firm (Dollcraft partnership) which had previously

been operating in good faith and in fair competition with the Nancy Ann organization, and by progressive steps advance into fields long previously duly and legally appropriated by Nancy Ann. Actions speak louder than words; and the Court may very properly draw an inference of intent from the planned and deliberate copying of Nancy Ann trade-marks which is so clearly shown by the record.

Dollcraft Co., the partnership (comprising Mr. & Mrs. Juster and Mrs. Juster's brother, Richard Mol-lison) began selling a line of dolls dressed in short dresses, and identified by marks in no way conflicting with those of Nancy Ann. Later, obviously at the urging of Patterson, a line of "Who Am I?" dolls were put out. Neither the dolls, the boxes in which the dolls were packed, or the leaflets listing the line of dolls, included the name of any of the dolls of their group. Assuming that they were intended to represent various characters selected from the nursery rhymes, it is obvious that their identity, in at least the majority of instances, could not be determined from mere inspection of the doll. The application of specific marks to the various dolls followed. Whether it was upon demand of the dealers for the convenience of their clerks, or for the convenience of their customers, or if it was Patterson's idea of stimulating sales, is not here important. On the stand, Mr. Juster testified that the dolls could be identified by their costumes alone; but he was unable to identify the Nancy Ann dolls by mere inspection.

The fact is that after the corporation had been formed under the control of Mr. Hinz and Mr. Kerr, the policy of applying to each doll box an identifying mark was adopted. Some of the marks so applied were not objectionable to Nancy Ann, as for example "Alice in Wonderland", "Hansel" and "Gretel". Others, including Red Riding Hood, Little Miss Muffet, Little Bo-Peep, Mistress Mary, and Little Miss Donnett were in direct conflict with marks previously adopted and used by Nancy Ann. Mr. Hinz, Mr. Kerr, Mr. Patterson, and Mr. and Mrs. Juster knew of Nancy Ann's previous use and registration of these marks. Obviously the plan was to trade on the good will of the Nancy Ann organization. That it accomplished the desired result is evidenced by the fact that within a few months, Dollcraft came "all out" with a "Fairylane Series" (Nancy Ann Reg. 438,495) including:

Red Riding Hood	Nancy Ann Reg. No. 420,077
Little Miss Muffett	" " Reg. No. 432,208
Little Bo-Peep	" " Reg. No. 395,454
Mistress Mary	" " Reg. No. 404,576
Little Miss Donnett	" " Reg. No. 404,586
Curly Locks	" " Reg. No. 404,581
Goldilocks	" " Reg. No. 395,451
Sugar and Spice	" " Reg. No. 403,240

To top it all, the whole group comes out as "Dolls with a Story" advertised as "Collector's Real Bisque—Dolls with a Story". (Exhibit 29.)

"Dolls With a Story"!! The connotation and mental image is *identical* with "Storybook"; and

could only have been appropriated with a deliberate intent to infringe the rights of Nancy Ann!

Nancy Ann Abbott founded a thriving business based on the theory that little girls would welcome a family of little miniature dolls depicting favorite characters from fairyland, storyland, Mother Goose land and other realms of fancy and fiction.

Against the warnings of others, Nancy Ann Abbott proved to the world that little girls (many grown up) would welcome a private little realm of fantasy in which they could reign supreme among their chosen subjects. On that ideology, Nancy Ann has established and built up a thriving business.

Because it was known to be a profitable business by Hinz, who supplied bodies by hundreds of thousands, and by Kerr who shipped out dressed dolls throughout the country by hundreds of thousands, and by Patterson who sold Nancy Ann dolls by the hundreds of thousands, each of these men had every impulse to use experience gained with the Nancy Ann organization to establish a competing business. Also because each was disgruntled, there was an urge to sabotage the trade-mark rights of Nancy Ann for their personal unjust enrichment—to reap where they had not sown * * *. That urge is believed to have impelled the deliberate copying of Nancy Ann trademarks.

The deliberate nature of the attempted raid seems obvious. The first notice of infringement to Dollcraft was dated October 29, 1949. The present action

was filed November 4, 1949. Obviously, notice of infringement was designedly provoked; and a bill of complaint for a declaratory judgment was ready and waiting for receipt of the anticipated notice.

The law is clear that under the circumstances of this case, the deliberate invasion of the rights of appellant by appellees should be restrained, regardless of whether the trade-marks here involved were registered or not.

“The protection of trade-marks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.” *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U. S. 203, 205, 62 S. Ct. 1022, 86 L. Ed. 1381 (1942).

The manner in which appellants, with knowledge of the Nancy Ann Storybook Dolls, Inc. registrations, deliberately copied marks long previously used

and registered by Nancy Ann is a material element in the case.

“A paramount consideration in determining this equitable question is Dunnell’s appropriation in 1933 of these words and using them in block capital letters, with full knowledge that they then were so used on Stores’ 320 Stores in Los Angeles, where Dunnell started his toilet seat cover business—a fact he at first denied and then admitted. Dunnell, with his eyes open, thus chose to seek the benefit of Stores’ vast expenditures for advertising on the chance that it might prove enjoined.” *Safeway Stores, Inc. v. Dunnell*, 80 U.S.P.Q., 115 at 120.

The law has been very clearly announced in recent decisions of the Courts of the Ninth Circuit. For example, the broad principles of trade-mark and unfair competition is aptly stated in *Brooks Bros. v. Brooks Clothing of California, Ltd.*, 65 U.S.P.Q. 301 at 308, wherein the Court says:

“A trade mark is merely a method used by a person to designate his goods. It cannot exist independent of a business. It depends on adoption and use, and not on originality or invention. Whatever may have been the rule in the past, the 1905 Trade Mark Registration Act allows the registration of proper names or words which, prior to its adoption, could not have been made the subject of a trade mark. It thus confers substantial rights on registrants under it. Among the most important of these is ‘to prohibit the use of it so far as to protect the owner’s good will against the sale of another’s product

as his.' And this extends 'to the user of a mark which has acquired secondary meaning.' Consequently, the courts, in both trade mark and unfair competition cases, have held that where the dominant portion of a trade mark, trade name or business has become identified in the mind of the public with the first user, he will be protected in the use of the name, even against a newcomer having the same surname."

More recently this Court of Appeals for the Ninth Circuit has expressed the law in terms aptly applicable to the facts of this case, as follows:

"TRADE NAMES AND TRADE MARKS
STAND ON A SIMILAR FOOTING.

"In California and elsewhere, a firmly established trade name receives the same protection from the law as a trade mark. In the recent case of *Eastern Columbia, Inc. v. Waldman*, 30 A.C. 269, 272-273 (74 U.S.P.Q. 114, 115), the Supreme Court of California said:

" 'It is asserted by the defendant that an absolute injunction will not be granted for the infringement of the right to use a word in what is called a "secondary meaning" as distinguished from a technical trade mark. Where words have acquired, as is established beyond dispute in this case, a fanciful meaning—a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning insofar as their use in business is concerned. Their common meaning has dropped into the background. Otherwise no right to

use them to the exclusion of others would have been acquired. When, however, words have acquired such a sense and are the subject of the good will and reputation of a business which they designate, there is little if anything left to distinguish them from a trademark, a symbol, characters or words which have no common meaning and which are artificial, insofar as the scope of protection afforded to the one who has the prior right.'

" 'An absolute injunction is proper where the defendant's conduct is unlawful. (Authority Cited.) The protection afforded trade names which have acquired the status here reached is treated in the same category as trade marks, where it is not necessary that the competitor use the words to describe his product. (Many cases cited.)' (Emphasis supplied.)" *Stork Restaurant Inc. v. Sahati*, 76 U.S.P.Q., 374 at 376-7.

"TRADE NAME GIVES RISE TO A PROPERTY RIGHT.

"Ownership of a trade name is a property right. It is made so by statute in California. Sections 14400, 14401 and 14402 of the Business and Professions Code (Deering, 1944) read as follows:

" '§14400. Ownership. Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner.'

" '14401. Transferability. Protection accorded. Any trade name may be transferred in the same manner as personal property in

connection with the good will of the business in which it is used or the part thereof to which it is appurtenant, and the owner is entitled to the same protection by suits at law or in equity.'

" '14402. Remedy for violation of rights. Any court of competent jurisdiction may restrain, by injunction, any use of trade names in violation of the rights defined in this chapter.'

"In *Eastern Columbia, Inc. v. Waldman*, supra, 30 A. C. at pages 270 and 271 (74 U.S. P. Q., 114, 115), the state Supreme Court recited that 'plaintiff has used the trade name "Eastern Columbia" and acquired property rights and good will therein,' and that 'The findings establish that the plaintiff owns the trade name of "Eastern Columbia".'

"The California rule accords with general laws. In *Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 612 (69 U.S.P.Q., 1, 3), Mr. Justice Douglas referred to trade names as 'valuable business assets' and adverted to 'the policy of the law to protect them as assets of a business,' citing *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 217.' " *Stork Restaurant, Inc. v. Sahati*, 76 U.S.P.Q., 274 at 377.

"THE LAW OF UNFAIR COMPETITION IS
BROADER THAN THE LAW OF
TRADE MARKS.

"The appellant, however, does not bottom its complaint solely upon the appellees' alleged vio-

lation of its property right in the trade name 'The Stork Club'. It also alleges that the appellees have been guilty of unfair competition by using the 'confusingly similar' name, 'Stork Club,' and related insigne of a stork standing on one leg and wearing a high hat.

"Before attempting to evaluate this phase of the appellant's case, it will be well to bear in mind that the reach of the law of unfair competition is greater than that of the law of trade marks.

"In *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412-413, the court said:

" 'Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.' (Cases cited.)

" 'This essential element is the same in trade mark cases as in cases of unfair competition unaccompanied with trade mark infringement. In fact, the common-law of trade marks is but a part of the broader law of unfair competition.' (Cases cited.)

" 'Common-law trade marks, and the right to their exclusive use, are of course to be classed among property rights, *Trade Mark Cases*, 100 U. S. 82, 92, 93; but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good-will that flows from it, free from unwarranted interference by others, is a property right, for

the protection of which a trade mark is an instrumentality. As was said in the same case (page 94), the right grows out of use, not mere adoption.'

"The principle was recognized by this court in *Phillips v. The Governor & Co., etc.* (C.C.A. 9), 79 F. 2d 971, 974 (27 U.S.P.Q., 229, 232)." *Stork Restaurant, Inc. v. Sahati*, 76 U.S.P.Q., 374 at 376.

"REAPING WHERE ONE HAS NOT SOWN.

"The decisions frequently refer to this sort of imitation as 'reaping where one has not sown' or as 'riding the coattails' if a senior appropriator of a trade name.

"By whatever name it is called, equity frowns upon such business methods, and in proper cases will grant an injunction to the rightful user of the trade name.

"In *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.* (C.C.A. 5), 123 F. 2d 582, 584 (51 U.S.P.Q. 435, 437-438), certiorari denied, 315 U.S. 824 (52 U.S.P.Q. 644), the court used the following language:

" 'This purpose is to project itself into that business arena panoplied in a name already favorably known, rather than to come into it on its own merits, and slowly building, here a little, there a little, establish its own place. * * * (Many cases cited)'

" 'These cases all hold that where as here it plainly appears that there is a purpose to reap where one has not sown, to gather where one

has not planted, to build upon the work and reputation of another, the use of the advertising or trade name or distinguishing mark of another, is in its nature, fraudulent and will be enjoined.'

"In *Cleo Syrup Corporation v. Coca-Cola Co.* (C.C.A. 8), 139 F. 2d 416, 417 (60 U.S.P.Q. 98, 100), certiorari denied, 321 U.S. 781-782 (60 U.S.P.Q. 578), the court declared that 'There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trademark or prevent its good will from being nibbled away by unfair competitors'."

Stork Restaurant, Inc. v. Sahati, 76 U.S.P.Q. 374 at 380-81.

In the present case, appellees had countless names of fanciful and fictional characters which they could have adopted and registered, just as Kerr & Hinz adopted and registered "Peg O' My Heart". There can be no reason other than a wish to injure the Nancy Ann organization and to benefit from its good will when it adopted and began using not just one but a number of the Nancy Ann trade-marks. On that point the Court has said:

"A vast field of words, phrases and symbols is open to one who wishes to select a trade mark to distinguish his product from that of another. Unquestionably in our ever-increasing complex business life, the trend of modern judicial decisions in trade mark matters is to show little patience with the newcomer who in adopting a mark gets into the border line zone between an open field and one legally appropriated to another. As be-

tween a newcomer and one who by honest dealing has won favor with the public, doubts are always resolved against the former.”

Skelly Oil Co. v. The Powerine Co. (32 U.S. P.Q. at 54).

Appellants have argued that the Nancy Ann organization has not used its registered marks in a trade-mark sense because in some cases the marks apply to only one type of doll, and because in some cases there have been applied two or more trade-marks to a single product.

The argument is without merit because it is fundamental that different marks may be used upon different products of the same manufacturer; and that a plurality of marks may be used upon the same product.

“Are the words King, Queen and Duke trade marks? I do not think they are in the sense that it prohibits their use as trademarks, and I think that a person may properly, legally apply more than one trade-mark to a given commodity.”

Brunswick, Balke, Collender v. National, 43 U.S.P.Q. 10.

“The fact that a manufacturer may employ a number of different names to designate different products does not destroy the trading value of such names where the primary purpose of each is to indicate origin and not quality. *Capewell Horse Nail Co. v. Mooney*, 167 F. 575; *John Rutgers Platen v. Canton Pharmacy Co.*, 143 O.G. 1113; *Layton Pure Food Co. v. Church and*

Dwight Co., 182 F. 24; Dixie Cotton Felt Mattress Co. et al v. Stearns & Foster Co., 185 F. 431.”

Simonize Co. v. Hollingshead, 20 U.S.P.Q. 327.

Appellees have claimed that appellant has competed unfairly by sending out notice of infringement to a few of Dollcraft Company customers. The charge is absurd. Notice was served only with respect to trade-marks actually owned and registered by the Nancy Ann organization. Such notice is *obligatory*, not only to protect the trade-mark rights of the trade-mark owner, but to obviate the accumulation of damages against an infringer. Such notice is a *legal duty*, not an unfair practice.

In bringing the present action for a declaratory judgment, appellees have ignored the plain and simple remedy provided by the trade-mark statutes for cancellation of the registrations here involved. The Act of February 20, 1905 is as follows:

“Sec. 13. U.S.C., title 15, sec. 93. That whenever any person shall deem himself injured by the registration of a trade-mark in the Patent Office he may at any time apply to the Commissioner of Patents to cancel the registration thereof. The commissioner shall refer such application to the examiner in charge of interferences, who is empowered to hear and determine this question and who shall give notice thereof to the registrant. If it appear after a hearing before the examiner that the registrant was not entitled to the use of the mark at the date of his application for registration thereof, or that the mark

is not used by the registrant, or has been abandoned, and the examiner shall so decide, the commissioner shall cancel the registration. Appeal may be taken to the commissioner in person from the decision of the examiner of interferences.”

Mr. Hinz, Mr. Kerr and Mr. Juster, all officers and/or directors of Dollcraft Company obviously had knowledge of the trade-marks owned and long used by the Nancy Ann organization. If in good faith they had deemed themselves injured by the registrations here involved, or any of them, the appropriate remedy was to file a petition for cancellation of the offending marks. In that way, the governmental agency authorized by statute to act in such situations would be called upon to review the facts and take such action under the statute as it might then deem proper.

Instead, the appellees have proceeded with use of the Nancy Ann trade-marks without regard to the Nancy Ann rights. Now, in the guise of a party injured by the Nancy Ann charge of infringement, Dollcraft has asked the Court to intercede in its behalf, and save it from the penalties of its infringement. Failure to have asked cancellation of any trade-mark registration of the Nancy Ann organization leaves Dollcraft in the position of one asking the Court to assume the duties delegated by Congress to the Patent Office. Be that as it may, the crux of this case is that Nancy Ann Storybook Dolls, Inc., is asking this Court to grant relief from a willful pirating of its trade-marks and good will.

CONCLUSION.

The technicalities of trade-mark law, and the fairly close distinctions which have cropped up in this case, give an impression of complexity. However, the issues are really few and simple. It is submitted that the following conclusions are inevitable:

1. The Nancy Ann trade-marks are valid; and the registrations here involved were duly and validly issued by the Patent Office.

2. Those registered trade-marks have been infringed by appellees.

3. Regardless of the trade-mark registrations, appellees have competed unfairly with appellant by applying to its products the various marks here involved, with knowledge that appellant had for many years been using the marks so extensively as to have established a secondary meaning for each mark as indicating a product of the Nancy Ann organization.

4. That this case should be remanded to the trial Court with instructions to enter a judgment of validity and infringement with respect to each of the trade-marks in suit, and for such further action as may be deemed proper, including injunctive relief and an award of costs.

Dated, San Francisco, California,
October 17, 1951.

Respectfully submitted,

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No. 12,953
United States Court of Appeals
For the Ninth Circuit

NANCY ANN STORYBOOK DOLLS, INC., a
corporation,

Appellant,

vs.

DOLLCRAFT COMPANY, a corporation;
LESTER F. HINZ and ROBERT E.
KERR,

Appellees.

BRIEF FOR APPELLEES.

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United States Court of Appeals For the Ninth Circuit

NANCY ANN STORYBOOK DOLLS, INC., a
corporation,

Appellant,

vs.

DOLLCRAFT COMPANY, a corporation;
LESTER F. HINZ and ROBERT E.
KERR,

Appellees.

BRIEF FOR APPELLEES.

This is an appeal from a judgment entered in the United States District Court for the Northern District of California, wherein the trade-marks "Red Riding Hood", "Little Miss Muffett", "Little Bo-Peep", "Mistress Mary", "Little Miss Donnett", "Curly Locks", "Goldilocks", "June Girl", "Story-book" and "Story" for dolls were held to be invalid and void and the registrations thereof were cancelled. It was further held in said judgment that the parties to the action had not unfairly competed with each other.

STATEMENT OF THE CASE.

This case originated in the District Court as an action for declaratory relief pursuant to 28 U.S.C., Section 2201.* Plaintiffs-appellees are Dollcraft Co., a California corporation, and Lester F. Hinz and Robert E. Kerr, individuals, the latter two being brought into the case by way of a cross-complaint filed by defendant-appellant. Appellee Dollcraft Co. is a manufacturer of dressed dolls. The defendant-appellant is Nancy Ann Storybook Dolls, Inc., a corporation, which is also a manufacturer of dressed dolls. Both appellee, Dollcraft Co., and appellant had the practice of manufacturing dressed dolls that represented nursery rhyme or storybook characters and identified these dolls by the nursery rhyme or storybook character name. The appellant began the practice of so naming its dolls with character names prior to the adoption of the practice by appellee, Dollcraft Co.

The appellant contends that because of its prior use of these names it now has the exclusive right to manufacture and sell dressed dolls representing the nursery rhyme or storybook characters known to everyone as "Red Riding Hood", "Little Miss Muffett", "Little Bo-Peep", "Little Boy Blue", "Mistress Mary", "Little Miss Donnett", "Curly Locks",

*§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

and "Goldilocks". It also contends that it is the only one that can manufacture and sell a doll under the name "June", "June Girl", or "June Bride". Furthermore, it contends that it has the exclusive right to identify these dolls as "Storybook" dolls or "Story" dolls. In other words, the public, as well as appellees, because of appellant's prior adoption and use of these descriptive character names for dolls, is forever precluded from making, using or selling dolls representing their conception of these nursery rhyme or storybook characters and identifying them by their character names.

These names of nursery rhyme or storybook characters are not used by either appellant or appellee, Dollcraft Co., as a means to identify the source or origin of the dolls but are used to identify the particular nursery rhyme or storybook character each doll represents. For example, "Red Riding Hood" is dressed in a red cape as Red Riding Hood has been represented in the nursery rhymes and storybooks from time immemorial. "Little Bo Peep" is dressed to represent a shepherdess having a shepherd's crook in her hands. In each instance the dolls are made to represent someone's conception of a particular nursery rhyme or storybook character. Under such circumstances, the character names do not function as trade-marks but function solely as identifying the character each doll represents. In other words, none of these descriptive names are used by appellant or appellee, Dollcraft Co., to point to the source or origin of the goods to which they are applied. However, they

are being used by appellant in an attempt to throttle legitimate competition. For example, the mere mention of the name "Red Riding Hood" cannot help but bring to mind the storybook or nursery rhyme character that represents a little girl dressed in a red cape. To say you have a Red Riding Hood doll would indicate to everyone that you have a doll dressed to represent the nursery rhyme or storybook character "Red Riding Hood". To exclude everyone from making or selling a doll that is a representation of Red Riding Hood and to preclude everyone from calling that doll by its common descriptive character name of Red Riding Hood is certainly not the intent, purpose or function of the trade-mark laws.

As a matter of fact, appellant, through one of its officers in his testimony, admitted the descriptiveness of the marks here in question. (Rowland R 258-260.) It was also admitted by the same witness that the dress of appellee Dollcraft Co.'s packages in which its dolls are marketed was not similar to the dress of the packages in which appellant's dolls are sold. (R 393.) Appellees, Lester F. Hinz and Robert E. Kerr, were brought into this action by way of a cross-complaint (R 62) and it is contended by appellant (Brief for Appellant, page 34) that because appellees, Lester F. Hinz and Robert E. Kerr, together own a controlling stock interest in appellee Dollcraft Co., they are jointly and severally responsible for the alleged infringing acts of appellee, Dollcraft Co., here complained of. This contention is wholly unsupported in fact or in law.

The appellees contend that the marks here involved are the common descriptive nursery rhyme or storybook character names and are *publici juris*, and therefore it is impossible for anyone to secure the exclusive right to manufacture dolls representing these nursery rhyme or storybook characters that have been known to the American public for years and years, and that it is impossible for anyone to acquire the exclusive right to call these character dolls by their common descriptive nursery rhyme or storybook character names.

THE ISSUES RAISED.

There are actually only three issues raised on this appeal:

(1) Are appellant's trade-mark registrations "Red Riding Hood", "Little Miss Muffett", "Little Bo-Peep", "Mistress Mary", "Little Miss Donnett", "Curly Locks", "Goldilocks", "June Girl", "Storybook" and "Story" valid and is appellant entitled to the exclusive use thereof?

(2) If valid, have these trade-marks been infringed by appellees?

(3) Have appellees unfairly competed with appellant?

The foregoing issues raised in this appeal will be discussed hereinafter and in so doing, the many errors of fact and of law appearing in brief for appellant will be pointed out to this Court.

SUMMARY OF ARGUMENT.

1. Appellant seeks a trial *de novo* before this Court because appellant has made no effort in its brief to show that the findings of fact and judgment of the District Court are not supported by substantial evidence, nor does appellant point to any evidence which would support findings of fact contrary to those found by the District Court.

2. The appellant's alleged doll names do not constitute a distinctive word or group of words adopted for the purpose of identifying the appellant's product, nor do the doll names function as trade-marks nor are they capable of a trade-mark function or use.

(a) The function of a trade-mark is to point out the origin or ownership of the article to which it is affixed or, in other words, to give notice to the public who manufactured or produced the article.

(b) The trade-marks here involved do not perform the function of pointing out the origin or ownership of the articles to which they are affixed.

3. The District Court found as fact that the trade-marks here involved are descriptive and therefore they are clearly invalid and such findings are based on substantial evidence including the admission of appellant that the marks are descriptive.

4. Descriptive names such as the particular names of nursery rhyme characters cannot be adopted as trade-marks nor can such names acquire a secondary meaning as a trade-mark by long continued and exclusive use, for to give them a secondary meaning is

to give such character names the full effect of a trade-mark while denying their validity as such.

(a) Descriptive names are not subject to adoption as trade-marks.

(b) Federal trade-mark registration does not alter inability to adopt descriptive names as trade-marks.

(c) Secondary meaning cannot attach to descriptive names and the District Court found as a fact that the marks here involved have not acquired a secondary meaning.

(d) Character names for dolls are descriptive.

5. The appellees, having the right to identify their doll products with their descriptive nursery rhyme or storybook character names, cannot be guilty of unfair competition.

6. Validity or invalidity of appellant's trade-mark not in issue when appellant was involved in opposition proceedings before patent office but examiner in patent office can rule on propriety of applicant's mark in such proceedings.

7. Appellant, by sending threatening letters to numerous customers of appellee, Dollcraft Co., forced said appellee to act immediately to protect its trade.

8. Appellees, Lester F. Hinz and Robert E. Kerr, are not guilty of trade-mark infringement or unfair competition.

9. *Stork Club* case not applicable to facts of instant action.

APPELLANT SEEKS A TRIAL DE NOVO
BEFORE THIS COURT.

From a reading of appellant's brief, it appears clearly that appellant misconstrues the true function of this Court. Appellant has no argument with the application of the law to the facts as found by the District Court, but merely argues that the District Court's findings of fact were wrong and should be set aside. However, appellant in its brief makes no effort to show that the findings of fact are not supported by the evidence or by substantial evidence, nor does appellant in its brief point to any evidence which would sustain findings of fact contrary to those found by the District Court.

Thus, we argue that having no quarrel with the application of the law to the facts as found, what appellant says in essence is that despite the fact that the findings of fact are supported by the only evidence, and that evidence is substantial, the District Court came to the wrong decision as to the facts.

It is the function of this Court to determine whether or not the District Court correctly applied the law to the facts as found and as to whether or not the facts as found are supported by substantial evidence and are not clearly erroneous. Inasmuch as appellant does not quarrel with the District Court's application of the law to the facts as found, the issue here is merely whether or not the findings of fact are clearly erroneous and whether or not the findings of fact are supported by substantial evidence.

The District Court found as a fact that all of appellant's trade-marks involved herein were descriptive. It is beyond question that the descriptiveness of a trade-mark is a question of fact for the trial Court. On this point the Court found as follows (R 108 to 111):

“16.

“The dolls produced by each party herein show themselves to have been designed, created and dressed so as to be the likenesses of well-known fictional characters whose names they bear.

“17.

“Each doll bearing the trade-marks here in issue is a manifestation of the fictional character itself whose name serves to identify and describe such doll.

“18.

“‘Story’ and ‘Storybook’ properly serve as generic names for all that class of dolls which portray or represent fictional characters, as does ‘Dolls With a Story’.

“19.

“The use which defendant-counter-claimant makes of the words ‘Storybook Dolls’ to identify the dolls indicate that such dolls represent characters in storybooks.

“20.

“The names ‘Storybook’, ‘Goldilocks’, ‘Little Bo-Peep’, ‘June Girl’, ‘Mistress Mary’, ‘Curly

Locks', 'Little Miss Donnett', 'Red Riding Hood', 'Little Miss Muffett', and 'Story' are primarily descriptive and cannot be withdrawn from public use by adoption as a trade-mark.

* * * * *

“24.

“The names ‘Storybook’, ‘Goldilocks’, ‘Little Bo-Peep’, ‘June Girl’, ‘Mistress Mary’, ‘Curly Locks’, ‘Little Miss Donnett’, ‘Red Riding Hood’, ‘Little Miss Muffett’, and ‘Story’ are descriptive and do not point to the origin or ownership nor indicate in the slightest degree the person, natural or artificial, who manufactured such dolls or brought them to market.

“25.

“The names ‘Storybook’, ‘Goldilocks’, ‘Little Bo-Peep’, ‘June Girl’, ‘Mistress Mary’, ‘Curly Locks’, ‘Little Miss Donnett’, ‘Red Riding Hood’, ‘Little Miss Muffett’, and ‘Story’ were adopted by and applied to dolls by defendant-counter-claimant because the dolls to which they were applied in appearance simulated a well-known story-book character.

“26.

“Defendant-counter-claimant has failed to show that the primary significance of the names ‘Storybook’, ‘Goldilocks’, ‘Little Bo-Peep’, ‘June Girl’, ‘Mistress Mary’, ‘Curly Locks’, ‘Little Miss Donnett’, ‘Red Riding Hood’, ‘Little Miss Muffett’, and ‘Story’, in the minds of the consuming public is not the character represented by the dolls bearing said names, but is the defendant-counter-claimant, the producer of said dolls.

“27.

“The ‘June Girl’ doll produced by defendant-counter-claimant shows itself to be a conceptual representation of a girl dressed for the month of June, it not being dressed in a bridal costume, but rather it is clothed in light, summery dress appropriate to an embodiment of the name itself, and the name denotes the doll, not the manufacturer, and is a descriptive name.”

Although in its brief appellant argues strenuously that its trade-marks here in question are not descriptive and that the trial Court erred in finding to the contrary, appellant makes no showing whatsoever that such findings are not supported by substantial evidence, nor does appellant point to any evidence controverting such findings. Thus, in effect, what appellant seeks is a trial *de novo* before this Court in an attempt to have this Court come to a different conclusion on the fact of descriptiveness than that of the trial Court. Such is not the function of this Court. Its function on this appeal on this issue is to set aside the findings of the trial Court only in the event it determines that such findings are not supported by substantial evidence or are clearly erroneous.

Jacuzzi Bros. v. Berkeley Pump Company et al. (9 Cir.), F. (2d), 91 U.S.P.Q. 24;

Lieshman v. General Motors Corp. (9 Cir.), 191 F. (2d) 522;

Refrigeration Engineering, Inc. v. York Corp. (9 Cir.), 168 F. (2d) 896, 78 U.S.P.Q. 315;

Bianchi v. Barili (9 Cir.), 168 F. (2d) 793;

Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co. (9 Cir.), 151 F. (2d) 91;

Federal Rules of Civil Procedure, Rule 52 (a).

Appellant's indirect attempt to have this Court retry such factual issues should fail.

THE APPELLANT'S ALLEGED DOLL NAMES DO NOT CONSTITUTE A DISTINCTIVE WORD OR GROUP OF WORDS ADOPTED FOR THE PURPOSE OF IDENTIFYING THE APPELLANT'S PRODUCTS, NOR DO THE DOLL NAMES FUNCTION AS A TRADE-MARK, NOR ARE THEY CAPABLE OF TRADE-MARK FUNCTION OR TRADE-MARK USE.

- (a) The function of a trade-mark is to point out the origin or ownership of the article to which it is affixed, or, in other words, to give notice to the public who manufactured or produced the article.

A trade-mark is a distinctive word or group of words or symbols adopted for the purpose of identifying the product of a particular manufacturer or vendor so that it may be unmistakably distinguished from the products of others. "To acquire the right to the exclusive use of a name, device or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached."

The function of the trade-mark is to facilitate the identification of the maker or seller of the merchandise, and one of the indispensable, basic and primary requirements of a trade-mark is that it distinctly point out the maker of the article to which it is attached.

Our Supreme Court in the case of *Del. & H. Canal Co. v. Clark*, 13 Wall. 311, 322, 1871, states:

“The office of a trademark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer.”

Again in *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412, 36 S. Ct. 357, 360, 55 L. Ed. 536, the Supreme Court ruled:

“The primary and proper function of a trademark is to identify the origin or ownership of the article to which it is affixed.”

The Supreme Court again in the case of *Columbia Mill Co. v. Alcorn, et al.*, 150 U.S. 460, 1893, 14 S. Ct. 151, 152, stated:

“It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others.”

In the case of *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97, 39 S.Ct. 48, 51, 1918, our Supreme Court stated:

“* * * its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another’s product as his; * * *”

- (b) The trade-marks here involved do not perform the function of pointing out the origin or ownership of the articles to which they are affixed.

In the present instance it is too obvious for argument that the sole and primary purpose of giving the individual dolls (dressed and designed to represent nursery rhyme characters) the precise name that they bore in nursery rhymes or storybooks is simply and clearly to describe and name the particular character which they were designed to represent and not to serve in a trade-mark function.

These nursery rhyme or storybook names are used by appellant and appellee, Dollcraft Co., solely to identify the particular character involved and for no other purpose. *It is essential in order to be a trade-mark and to serve as a trade-mark that the following tests be answered affirmatively:*¹

(1) Does the name possess a trade-mark function? In this connection what is meant is, does it, as in the language of the Supreme Court, point out distinctly the origin or ownership of the article to which it is affixed?

(2) Does it "point out the maker of the article to which it is attached?"

(3) Is it designed as its primary object and purpose to indicate the owner or producer of the commodity and to distinguish it from like articles manufactured by others?

¹All emphasis ours unless otherwise noted.

(4) Does it designate the goods as the product of the particular trader?

(5) Is it the primary purpose or function of the mark to indicate the producer?

Obviously, in the present instance, giving the dolls the names of the well-known characters which they clearly depict and represent in the nursery rhymes or storybooks was primarily for the purpose of descriptively describing the dolls so that the purchasers would have this information in addition to the visual appearance of the dolls so as to identify the characters which the dolls depict. Consequently, all of the above questions in the present instance must be answered in the negative and, therefore, there can be no distinctiveness or trade-mark function in the use of the well-known character names of dolls having the appearance of nursery rhyme characters which they depict and for which they are named.

Appellees refer this Court to the late decision of *Walt Disney Productions, Inc., et al. v. Souvaine Selective Pictures*, 98 F.S. 774. In this case, the plaintiff claimed exclusive right to show a picture entitled "Alice in Wonderland" and sought a preliminary injunction against defendant to prevent the showing of defendant's "Alice in Wonderland." In denying plaintiff's motion for preliminary injunction, the Court said:

"* * * The plaintiffs claim that they have acquired property rights by reason of vast sums of money that they have expended in making their

picture and in advertising it to the public, so that the title 'Alice in Wonderland' has acquired a secondary meaning. Admittedly the book 'Alice in Wonderland' is no longer subject to copyright and is as much in the public domain as are Shakespeare's plays. Anyone has a legal right to make a picture based on Louis Carroll's book and entitled 'Alice in Wonderland.'

* * * * *

"* * * This is the sort of competition that perhaps should be encouraged rather than suppressed."

The Court is also referred to the decision of the Court of Customs and Patent Appeals entitled *Nancy Ann Dressed Dolls (Nancy Ann Storybook Dolls, Inc., assignee, substituted v. Ippolito* (184 F. (2d) 201, 202, Exhibit 57). This opinion fully affirms both the examiner and the Commissioner of Patents in the opposition proceedings with respect to the descriptiveness of the trade-mark "Nursery Rhymes". On pages 3 and 4 of the majority opinion, the Court says:

"The Examiner of Interferences pointed out that in the notice of opposition it was alleged that appellant's mark 'is a generic term' and that it 'cannot serve to identify its goods to the exclusion of the like products of opposer, * * *.' He held that even though the expression 'Nursery Rhymes' had not been shown to have been used by appellee other than orally, that such mark 'is *generically descriptive* of the entire line of dolls sold by the opposer under the names of nursery rhyme characters,' and that therefore appellee and its customers are entitled to use the designation

‘Nursery Rhymes’ to identify their line of dolls representing characters from ‘Nursery Rhymes.’

* * *

“The examiner further rejected the registration *ex parte*, for the stated reason that the mark would be understood by the purchasing public as referring to any and all doll reproductions of fictional characters from ‘Nursery Rhymes’ as a class. *He held that every producer of dolls had the right freely to make and sell his conception of ‘Nursery Rhyme’ characters familiar to everyone from childhood days and that the common right to make any article is inseparable from the right to use words which aptly describe it*, citing *Singer v. June*, 163 U.S. 169; *Beckwith v. Commissioner of Patents*, 252 U.S. 538. He therefore held that the descriptiveness clause of Section 5 of the involved act was deemed to constitute a bar to the registration of appellant’s mark.

“On appeal the commissioner sustained all of the reasoning advanced by the Examiner of Interferences.

“We are of opinion that the decision of the commissioner is without error.”

Appellant contends in its brief (pages 10 to 14) that, because the Patent Office issued trade-mark registrations to it for the marks here involved, these trade-marks are practically beyond recall because of the presumption of validity attaching thereto by reason of issuance thereof. The appellant’s position in this respect completely disagrees with this Court’s view as set forth in the recent case of *Jacuzzi Bros., Inc., v. Berkeley Pump Co.*, 91 U.S.P.Q., 24

F. (2d), where, in considering the validity of the acts of the Patent Office as an administrative body, Judge Fee said:

“The presumption of validity of administrative grant has been in recent years almost reduced to nullity in patent cases. The justice of the abandonment of this doctrine might be claimed because some absurd results have been reached by administrative bodies.” However, no matter what defects there may be in administrative bodies or courts composed of experts, questions of fact should be settled in the trial tribunal, reversible only because of clear error.

* * * * *

“* * * Comment has heretofore been made in *Myers v. Fruchauf*, 90 F. Supp. 265, 268 [79 U.S.P.Q. 173, 176] upon the interesting circumstance that the Patent Office, which is the oldest administrative body, has currently lost the quality of sanctity which emanates from such tribunals.”

Trade-mark registrations are entitled to no more sanctity than are patents. The Patent Office is not infallible in issuing either patents or trade-mark registrations. It has many times been overruled by the Courts as to its opinion of what is a valid trade-mark.

This Court has many times held that trade-mark registrations were invalid because the trade-marks were descriptive:

Jell-Well Dessert Co. v. Jell-X-Cell Co., 22 F. (2d) 522. “Jell Well” held to be descriptive;

Van Camp Sea Food Co., Inc. v. Westgate Sea Products Co., 28 F. (2d) 957. “Chicken” held to be descriptive of young tuna;

Van Camp Sea Food Co. v. Cohn-Hopkins et al, 56 F. (2d) 797. "Chicken of the Sea" held descriptive of young tuna.

THE DISTRICT COURT FOUND AS FACT THAT THE MARKS HERE INVOLVED ARE DESCRIPTIVE AND THEREFORE THEY ARE CLEARLY INVALID, AND SUCH FINDINGS ARE BASED ON SUBSTANTIAL EVIDENCE INCLUDING THE ADMISSION OF APPELLANT THAT THE MARKS ARE DESCRIPTIVE.

The record before this Court establishes without contradiction that the marks here involved are descriptive and the District Court so found.

The findings of the District Court in this respect (R 108-111) are:

"16.

"The dolls produced by each party herein show themselves to have been designed, created and dressed so as to be the likenesses of well-known fictional characters whose names they bear.

"17.

"Each doll bearing the trade-marks here in issue is a manifestation of the fictional character itself whose name serves to identify and describe such doll.

"18.

"'Story' and 'Storybook' properly serve as generic names for all that class of dolls which portray or represent fictional characters, as does 'Dolls With a Story.'

“19.

“The use which defendant-counter-claimant makes of the words ‘Storybook Dolls’ to identify the dolls indicate that such dolls represent characters in storybooks.

“20.

“The names ‘Storybook,’ ‘Goldilocks,’ ‘Little Bo-Peep,’ ‘June Girl,’ ‘Mistress Mary,’ ‘Curly Locks,’ ‘Little Miss Donnett,’ ‘Red Riding Hood,’ ‘Little Miss Muffett,’ and ‘Story’ are primarily descriptive and cannot be withdrawn from public use by adoption as a trade-mark.

* * * * *

“24.

“The names ‘Storybook,’ ‘Goldilocks,’ ‘Little Bo-Peep,’ ‘June Girl,’ ‘Mistress Mary,’ ‘Curly Locks,’ ‘Little Miss Donnett,’ ‘Red Riding Hood,’ ‘Little Miss Muffett,’ and ‘Story’ are descriptive and do not point to the origin or ownership nor indicate in the slightest degree the person, natural or artificial, who manufactured such dolls or brought them to market.”

“25.

“The names ‘Storybook,’ ‘Goldilocks,’ ‘Little Bo-Peep,’ ‘June Girl,’ ‘Mistress Mary,’ ‘Curly Locks,’ ‘Little Miss Donnett,’ ‘Red Riding Hood,’ ‘Little Miss Muffett,’ and ‘Story’ were adopted by and applied to dolls by defendant-counter-claimant because the dolls to which they were applied in appearance simulated a well-known story-book character.

“26.

“Defendant-counter-claimant has failed to show that the primary significance of the names ‘Storybook,’ ‘Goldilocks,’ ‘Little Bo-Peep,’ ‘June Girl,’ ‘Mistress Mary,’ ‘Curly Locks,’ ‘Little Miss Donnett,’ ‘Red Riding Hood,’ ‘Little Miss Muffett,’ and ‘Story,’ in the minds of the consuming public is not the character represented by the dolls bearing said names, but is the defendant-counter-claimant, the producer of said dolls.

“27.

“The ‘June Girl’ doll produced by defendant-counter-claimant shows itself to be a conceptual representation of a girl dressed for the month of June, it not being dressed in a bridal costume, but rather it is clothed in light, summery dress appropriate to an embodiment of the name itself, and the name denotes the doll, not the manufacturer, and is a descriptive name.”

The findings of the District Court that the marks “Storybook,” “Goldilocks,” “Little Bo-Peep,” “June Girl,” “Mistress Mary,” “Curly Locks,” “Little Miss Donnett,” “Red Riding Hood,” “Little Miss Muffett,” and “Story” were primarily descriptive are certainly findings of fact. All these findings of fact (Findings 19, 20, 24-27, R. 109-111) of descriptiveness are supported by substantial evidence.

We have only to point to the testimony of Mr. Rowland, Secretary-Treasurer of the appellant company, an adverse witness, to establish without doubt the descriptiveness of each of the marks here involved.

These telling admissions by Mr. Rowland were wrung from him after he tried every possible way to avoid a direct answer to the questions propounded. Finally, the answers to these questions relative to descriptiveness were so obvious that even Mr. Rowland had to admit that each of the marks here involved was completely descriptive.

With respect to the mark "Red Riding Hood" and marks of that character, Mr. Rowland testified at R 257-258 as follows:

"Q. Now isn't it a fact, Mr. Rowland, that the name 'Little Red Riding Hood' was adopted by you and applied to a doll because that doll in appearance simulated a well-known storybook character?

A. No; it was Nancy Ann's interpretation of 'Red Riding Hood'.

Q. And the fact that it is similar to 'Red Riding Hood' had nothing to do with your adopting the name 'Red Riding Hood' for that doll; is that your answer?

A. As I say, it is her interpretation of what 'Red Riding Hood' looked like, and that is why the mark was adopted.

Mr. Mellin. May that question before the last be read to the witness by the reporter?

(Reporter read the question as follows:

Q. Now isn't it a fact, Mr. Rowland, that the name 'Little Red Riding Hood' was adopted by you and applied to a doll because that doll in appearance simulated a well-known storybook character?)

A. Yes it is."

Again at R 270 Mr. Rowland said:

“Q. And when someone says, ‘Little Red Riding Hood’, immediately to you that means a storybook doll dressed like Little Red Riding Hood, that is correct?”

A. Not only to me, but it means that to every youngster in the country.

Q. And regardless of the type of miniature doll, Mr. Rowland?

A. Yes, sir.”

Also at R 364 Rowland made the following admission:

“Q. That is also true, isn’t it, that as far as you are concerned, that when the appellation ‘Little Red Riding Hood’ was put on the doll, that it did not describe any one character that the doll represented; it was merely to indicate that it was manufactured by Nancy Ann Dressed Dolls, Inc.?”

A. And it was Nancy’s interpretation of Little Red Riding Hood?

Q. Then it was put on for at least one purpose, of indicating the character in the storybooks and nursery rhymes which the doll represented.

A. As her interpretation, yes, sir.”

Then in discussing the marks “Little Bo-Peep,” “Little Miss Muffett” and “Little Miss Donnett,” Rowland at R 259-260 said:

“Q. The ‘Little Bo-Peep’ doll Exhibit A-2 was somebody’s conception of the storybook character Little Bo-Peep, isn’t that correct?”

A. That is correct.

Q. And the name 'Little Bo-Peep' was adopted for that doll because it was the conception of somebody of what Little Bo-Peep was in Nursery Rhymes, is that right?

A. No, it was not adopted for that doll; it was adopted for a doll.

Mr. Mellin. Would you read the question to the witness?

(The reporter read the question.)

A. No, I repeat my answer, that the name was not adopted for that doll; it was adopted for a doll which we later called 'Bo-Peep'.

Q. And because of the fact that it was somebody's conception of what Bo-Peep, the Nursery Rhyme character, would look like?

A. Yes, sir.

Q. And that, in substance, is true of all of the other storybook character dolls, that your company puts out today, to wit: 'Little Miss Muffett', 'Little Miss Donnet' and so on?

A. It is Nancy Ann's version of the doll.

Q. Of the particular character in the Nursery Rhymes or storybooks?

A. That is correct."

The District Court found as a fact that the name "Storybook" was descriptive. (Findings 19, 20 and 24 supra; R 109-110).

In support of the descriptiveness of "Storybook", the Court is referred to the testimony of Mr. Rowland (R 270) as follows:

"Q. You recall that it was the position of the defendant here, Nancy Ann Dressed Dolls, that the words 'Nursery Rhymes' were synonymous

with 'Storybook', 'Mother Goose', and things of that sort?

A. Yes, sir. Are you pertaining to the Nancy Ann Storybook Doll corporation or the old corporation? You always use the old name.

Q. I will speak of them collectively.

A. All right; fine.

Q. And that is still your contention, isn't it?

A. Yes, sir.

Q. So that, as far as your position is concerned here, the words, 'Storybook', 'Nursery Rhymes', 'Mother Goose', 'Fairyland' are all synonymous terms, all of which would call to mind, when applied to the fictional characters, all would call to mind the same general fictional characters, isn't that correct?

A. That is a Storybook Doll."

Again at R 370-371, Rowland admitted the descriptiveness of "Storybook" in the following testimony:

"Q. Would you say that when the words are used together, 'Storybook Dolls', that that would indicate dolls representing characters in story-books or not?

A. Yes, they would, story-book dolls."

Then at R 277, Rowland admitted that "Nursery Rhymes", a name he already admitted was synonymous with "Storybook", was descriptive of dolls representing nursery rhyme characters, saying:

"Q. I see. You did take the position before the Patent Office, didn't you, that the trade-mark 'Nursery Rhymes' was descriptive of dolls representing nursery characters—nursery rhyme characters, didn't you?

A. Put out by us, yes sir.

Q. And that was the basis of your opposition to the registration of the trade-mark 'Nursery Rhymes' by Ippolito, isn't that correct—Hollywood Doll Company?

A. I believe it was; I would have to check with my counsel to make sure?"

The District Court also found that the name "June Girl" was descriptive. (Finding 20, 24 and 27, R 109-111).

With respect to "June Bride," Mr. Rowland testified this mark was descriptive, stating at R 369-370 the following:

"Q. Wouldn't you say that the appellation June Bride as it applied to a doll dressed to simulate a Bride—would you say that is descriptive of the doll?

A. It is descriptive of their doll, yes.

Q. It would be descriptive of our doll?

A. Yes.

Q. Purely descriptive, is that a fact?

A. Yes."

It is seen from the above testimony that the findings of fact as made by the District Court are fully supported by substantial evidence. Although the appellant requests this Court to set aside these findings of fact, it utterly fails to point out in its brief any evidence in this case that in any way establishes that findings of fact 16, 17, 18, 19, 20, 24, 25, 26 and 27 are clearly erroneous or not supported by the evidence. In other words, what appellant indirectly seeks is a trial *de novo* before this Court of Appeals. Such pro-

cedure is improper as was recently decided by this Court in the case of *Jacuzzi Bros. Inc. v. Berkeley Pump Co.*, F. (2d), 91 U.S.P.Q. 24, where it was said:

“* * * But it is contended that, since the Patent Office and the Trial Court disagreed, we should find the facts de novo. The assumption of such authority by the Appellate Court would be an usurpation. However, we examine the facts to determine whether the findings of the Trial Judge are clearly erroneous under Rule 52, Federal Rules of Civil Procedure, Title 28, U.S.C.A., and must be set aside.

“If there is not firm adherence to such a rule, everything is cast adrift. The trial courts find the facts. If appellate courts exercise no self-restraint, then, after the primary facts are thus found, these same facts are found anew twice over, with varying results. Not only is there no finality, but the findings may change with shifting personnel or on subsequent hearings. Not only finality, but stability is lost. All is confusion.”

Pursuant to Rule 52, Federal Rules of Civil Procedure:

“Findings of fact shall not be set aside unless clearly erroneous, * * *”

*(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly

On the above evidence, which is uncontradicted, and was elicited from an officer of defendant, how can it be said that the District Court's findings of descriptiveness are in error or that such findings are not supported by substantial evidence?

A recent case in which the present appellant was involved and in which it contended the trade-mark "Nursery Rhymes" was descriptive was that of *Nancy Ann Dressed Dolls (Nancy Ann Storybook Dolls, Inc., assignee, substituted) v. Ippolito*, 77 U.S.P.Q. 545. In this case the present appellant objected to Ippolito's application for registration of the trade-mark "Nursery Rhymes" for dolls; appellant here opposed on the ground that the trade-mark "Nursery Rhymes" was confusingly similar to its trade-marks "Storybook" and "Mother Goose" and that it (present appellant) in fact called some of the dolls manufactured by it "with names, characters, and jingles derived from the nursery rhymes and child story books familiar to children throughout the United States". Said names and characters so used by the appellant here include "Little Boy Blue", "Red Riding Hood", "Little Miss Muffett", "Jack and Jill" and "Little Bo Peep". It is interesting to note what appellant here had to say about such a mark as

erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses. The findings of a master, to the extent that the Court adopts them, shall be considered as the findings of the Court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

“Nursery Rhymes” when the shoe was on someone else’s foot. In this respect the Patent Office found that in its notice of opposition (Ex 55 page 5) the appellant here made the following contentions:

“The notice of opposition therefore appears to be based upon the confusion in trade clause of section 5 of the Trade Mark Act of 1905, and upon the alleged *descriptive or generic nature* of applicant’s mark. The Examiner of Interferences in sustaining the notice of opposition referred specifically to the allegations *that the mark sought to be registered ‘is a generic term,’ for such products and that ‘it cannot serve to identify its goods to the exclusion of the like products of the opposer.’ * * **”

In analyzing the above quotation, it is particularly interesting to find that in that litigation the present appellant considered such marks as “a generic term” for such products and that it cannot serve to identify its (applicant Ippolito’s) goods to the exclusion of the like products of the opposer (Nancy Ann). (This is directly opposite to the position which appellant takes in the suit here at bar.)

The position taken by the present appellant, when it was involved in the above cited opposition proceedings with respect to generic quality of the trade-mark “Nursery Rhymes”, is legally sound and applies with equal force to the trade-marks before this Court in the instant action; that is, “Red Riding Hood”, “Little Boy Blue”, “Little Miss Muffet”, “Jack and Jill”, and “Little Bo Peep”, and each of these trade-marks is “a generic term” for the particular character rep-

resented and cannot serve to identify appellant's or any other person's goods to the exclusion of the appellees or other members of the public.

As a matter of fact the Patent Office in the same case, at page 547, stated this rule in the following language:

“ ‘Certainly every producer of dolls is entitled freely to make and sell his conception of nursery rhyme characters familiar to all from childhood. *And it is fundamental that the common right to make any article is inseparable from the right to employ words which aptly describe it.* Singer v. June, 163 U.S. 169, 1896 C.D. 687. Beckwith v. Commissioner of Patents, 252 U.S. 538, 1920 C. D. 471. * * * ’ ”

Applying this rule to the appellee, Dolleraft Co., we find that the appellee, Dolleraft Co., is a producer of dolls and was entitled to make and sell its conception of nursery rhyme characters familiar to all from childhood and, therefore, appellee having the common right to make such character dolls has the inseparable right to employ names which aptly describe said dolls, so that the appellee, Dolleraft Co., has the unqualified right to describe its conception of Red Riding Hood with the descriptive name “Red Riding Hood” dolls and, likewise, to describe the other nursery rhyme characters with their common descriptive character names.

The nursery rhymes and fairy tales here involved are in the public domain as are the individual characters portrayed in these nursery rhymes. Anyone

has a legal right to reproduce either the nursery rhymes or the characters. Certainly, no one has a monopoly on the nursery rhyme or storybook character names that are in the public domain. As was said in *Walt Disney Productions, Inc., et al. v. Souvaine Selective Pictures, Inc., et al.*, 98 F. Supp. 774:

“* * * The plaintiffs claim that they have acquired property rights by reason of vast sums of money that they have expended in making their picture and in advertising it to the public, so that the title ‘Alice in Wonderland’ has acquired a secondary meaning. Admittedly the book ‘Alice in Wonderland’ is no longer subject to copyright and is as much in the public domain as are Shakespeare’s plays. Anyone has a legal right to make a picture based on Louis Carroll’s book and entitled ‘Alice in Wonderland’.”

The right to make a picture “Alice in Wonderland” unquestionably gives the right to reproduce the character “Alice”. Similarly, anyone has the right to reproduce the nursery rhymes or storybook characters in the public domain and call them by their character names.

Another interesting case recently decided by the Second Circuit Court of Appeals and involving the same type of trade-mark is that of *Durable Toy & Novelty Corporation v. J. Chein & Co., Inc., et al.*, 133 Fed. (2d) 853. In this case the facts and holdings were as follows:

“* * * The business of the plaintiff and of its predecessor (it will not be necessary to distin-

guish between them), has been and still is the manufacture of toy banks, which since 1907 it has continuously sold under three registered trade-marks, in all of which the most characteristic feature is the words, 'Uncle Sam's.' The banks have been marketed at between fifty-nine cents and two dollars and a half; that which has had the largest sale contained a registering device which automatically opens the bank when ten dollars have been deposited. The plaintiff has guaranteed all its banks against mechanical defects, has on occasion been called upon to respond, and has always done so. It has advertised very extensively for many years, and the mark may be assumed to have come to indicate to the buyers of toys for retail dealers generally throughout the country that the plaintiff makes any toy banks which bear it. The defendant, J. Chein & Co., Inc., makes tinware of various kinds, such as pails, dishes and the like; and in the early part of 1941, it added to these a rudely made tin toy bank, in shape and color made to imitate the hat which is part of the accredited costume of the figure, 'Uncle Sam.' A slit in the top received coins and the bottom was removable to take them out; upon the top was the legend: 'Uncle Sam Bank'. The retail price of this bank was only ten cents; the defendant, Woolworth Company, alone has sold it, but it has sold a very large number. Both defendants knew of the plaintiff's trade-mark during the period involved in the suit.

* * * * *

*** Where the name is personal or the mark is coined, it will be hard indeed for the newcomer

to find any excuse for invading it, even though his user does no more than vaguely confuse the reputation of the first user with his own; he has no lawful interest in adopting such a mark. But that is not this case; 'Uncle Sam' is part of the national mythology, not entirely unlike the flag, or any other part of our inherited patriotic paraphernalia; all have a measurable interest in its use. Indeed the very fact that it has been thought necessary to forbid the use of the flag for advertising, is evidence that the use had a value, 4 U.S.C.A. Sec. 3; Sec. 1425 (16) N.Y. Penal Law Consol. Laws N.Y.C. The figure and name of 'Uncle Sam' are not indeed the objects of the same national piety, but there is nevertheless apparently some advantage in exploiting them, and, while it remains lawful to do so, the advantage is not negligible. Balanced against any possible damage to the plaintiff's reputation among buyers for retailers, we think it should prevail. If the plaintiff had wished a truly proprietary sign, it needed only slight ingenuity to contrive one which would have protected it without question. It was not content with that; like the defendants, it wished to throw about its banks a vague implication of solidity, and at the same time to create a trade-mark. We do not say that even so it would be unable to prevent the actual appropriation of its customers; but we do hold that when there is no more at stake than a possible—and not very probable—cheapening of its reputation, it cannot deprive others of the same commercial advantage which led it originally to adopt a legend so commonly employed."

It is submitted that the employment by appellee, Dollcraft Co., of the descriptive names of nursery rhyme characters to identify its conception of those characters is entirely legal and proper and that by so doing appellee, Dollcraft Co., has not infringed upon any trade-mark rights of the appellant or unfairly competed with appellant. If there be any fault or cause of complaint on behalf of appellant it should be directed to appellant itself for picking such descriptive names for its products, knowing full well that these descriptive names of nursery rhyme characters were *publici juris* as a part of the mythology of the American public. It should have known that no one could secure the exclusive right to the use of such descriptive and mythological names as those of our nursery rhyme characters.

A very late decision by this Court establishes the impropriety of attempting to monopolize a name in the public domain. This Court in the case of *Chamberlain v. Columbia Pictures Corp.*, 186 F. (2d) 923, in discussing the name "Mark Twain" said:

"The District Court concluded that inasmuch as the story 'Jumping Frog of Calaveras County' was in the public domain and that there is also, in the public domain, other historic material with the name 'Mark Twain' which belongs to everybody and since there exists no exclusive right to the use of the name 'Mark Twain' there was no unfair competition in what appellee did.

* * * * *

"* * * We think the name Mark Twain is incapable of acquiring a secondary meaning in con-

nection with literary property. The name Mark Twain, from a literary standpoint, indicates only the writings of Samuel L. Clemens, which is a primary meaning.”

We can, therefore, summarize the point first, that the doll names given the dolls by the appellees are not distinctive but purely descriptive and *publici juris* and incapable of exclusive appropriation; second, they are not trade-marks in that they have no function and no intended function to distinctively point out and designate the origin or producer of the dolls.

DESCRIPTIVE NAMES, SUCH AS THE PARTICULAR NAMES OF NURSERY RHYME CHARACTERS, CANNOT BE ADOPTED AS TRADE-MARKS, NOR CAN SUCH NAMES ACQUIRE A SECONDARY MEANING AS A TRADE-MARK BY LONG, CONTINUED AND EXCLUSIVE USE, FOR TO GIVE THEM A SECONDARY MEANING IS TO GIVE SUCH CHARACTER NAMES THE FULL EFFECT OF A TRADE-MARK WHILE DENYING THEIR VALIDITY AS SUCH.

(a) **Descriptive names not subject to adoption as trade-mark.**

As is established by the record, appellant has adopted, with three exceptions, as alleged trade-marks for its dolls the names of nursery rhyme characters. The three exceptions are “Storybook”, “Story” and “June Girl”; said exceptions also being generically descriptive. It is fundamental that descriptive names cannot be adopted as trade-marks because everyone has the right to describe its product in the descriptive words which identify said product.

The District Court found as a fact (R 108-109) that the dolls to which the marks here involved were applied, were dressed so as to be the likeness of well-known fictional characters whose names they bear stating:

“16.

“The dolls produced by each party herein show themselves to have been designed, created and dressed so as to be the likenesses of well-known fictional characters whose names they bear.

“17.

“Each doll bearing the trade-marks here in issue is a manifestation of the fictional character itself whose name serves to identify and describe such doll.

* * * * *

“20.

“The names ‘Storybook’, ‘Goldilocks’, ‘Little Bo-Peep’, ‘June Girl’, ‘Mistress Mary’, ‘Curly Locks’, ‘Little Miss Donnett’, ‘Red Riding Hood’, ‘Little Miss Muffett’, and ‘Story’ are primarily descriptive and cannot be withdrawn from public use by adoption as a trade-mark.”

A Supreme Court case, wherein the prohibition of adopted, descriptive or geographic words as trade-marks was discussed, is that of *Del & H. Canal Co. v. Clark*, 13 Wall. 311. The trade-mark involved in this case was “Lackawanna coal” and the plaintiff mined its coal from the Lackawanna Valley and designated it “Lackawanna coal.” A considerable

time after the plaintiff initially adopted this trade-mark for its coal, the defendant, also mining coal from the Lackawanna Valley, called its coal "Lackawanna coal," and suit was brought by the plaintiff to enjoin defendant's infringement of its trade-mark.

"* * * No one can claim protection for the exclusive use of a trademark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, be employed as a trademark and the exclusive use of it be entitled to legal protection. As we said in the well considered case of *Amoskeag Mfg. Co. v. Spear, supra*, 'the owner of an original trademark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate *their names* or quality. He has no right to appropriate a sign or a symbol which from the nature of the fact it is used to signify, others may employ with equal truth and, therefore, have an equal right to employ for the same purpose.' * * *

* * * * *

"* * * It is only when the adoption or imitation of what is claimed to be a trade-mark

amounts to a false representation, express or implied, designated or incidental, that there is any title to relief against it. True, it may be that the use by a second producer, in describing truthfully his prooduct, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false misrepresentations, and equity will not enjoin against telling the truth."

As Judge Roche said (R 100) in his opinion below:

" 'No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection.' This Court finds that all of the other names claimed and registered as trade-marks by Nancy Ann, and which are in issue here, are incapable, inherently and because of the two rules just expressed, of functioning as valid trade-marks in their application by Nancy Ann."

The Ninth Circuit Court followed the *Del. & H. Canal Co. v. Clark* rule in the case of *Jell-Well Dessert Co. v. Jell-X-Cell Co., Inc.*, 22 Fed. (2d) 522, 9 C.C.A. In this case the plaintiff owned the trade-mark registration "Jell-Well" for a gelatinous dessert and charged that the defendant selling a similar product under the trade-mark "Jell-X-Cell" infringed its trade-mark. The Ninth Circuit Court of Appeals held that the trade-mark "Jell-Well" was descriptive and, therefore, invalid, stating the following:

"The question upon which the case turns is whether or not plaintiff's trade-mark 'Jell-Well' was entitled to registration under the United States Trade-Mark Act (Act Feb. 20, 1905 [Sec. 4939, U.S.R.S.]), which provides:

"* * * No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark: * * * Provided, that no mark which consists merely in the name of an individual, * * * or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this act.' Barnes' Fed. Code, § 8994 (15 U.S.C.A. § 85).

"Many cases might be cited in support of the principle, sustained by the Supreme Court as founded on reason and authority, that there can be no appropriation of a name which is descriptive of an article of trade, its qualities or in-

gredients, or any word, letters or symbols which others may employ with equal truth, and as a consequence have an equal right to use for the same purpose. *Canal Co. v. Clark*, 13 Wall. (80 U.S.) 311, 20 L.Ed. 581; *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446, 31 S. Ct. 456, 55 L.Ed. 536.

* * * * *

“* * * The commodities manufactured and sold by plaintiff and defendant are for making desserts. They are a powder made from a gelatine base, which is flavored, and after preparation can be used as an article of diet. Gelatine, made from bones and tissues of animals, is made into a powder, to which hot water is added to dissolve the powder; then the mixture is set to cool, and in a short time develops into a jelly. As the jellied substance must be attractive to the eye and taste, it is, of course, necessary that the gelatine used must jell well; that is, it must be of sufficient firmness to present an attractive appearance. Plainly, therefore, a very necessary quality of the gelatinous dessert product is that it shall jell well, and it is that particular quality that is described in the word ‘Jell-Well.’

* * * * *

“* * * We regard the word ‘Jell-Well’ as primarily descriptive; hence it cannot be withdrawn from public use by adoption as a trademark. *Computing Scale Co. v. Standard Computing Scale Co.* (C.C.A.) 118 F. 965; *Franklin Knitting Mills v. Fashionit Sweater Mills* (D.C.) 297 F. 247; *Nims on Trade-Marks*, p. 392; *Vacuum Oil Co. v. Climax* (C.C.A.) 120 F. 254.”

It is submitted that the trade-marks "Lackawanna coal" for Lackawanna coal or "Jell-Well" for a dessert that jells well is no different than calling a Red Riding Hood doll "Red Riding Hood" or a storybook character doll a "Storybook Doll". As this Court stated in its Jell-Well opinion, "Any words, letters or symbols which others may employ with equal truth" for the same purpose can be used.

In other words, no words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right for the same purpose. This rule was very clearly stated and properly applied by the Supreme Court in the case of *Standard Paint Company v. Trinidad Asphalt Manufacturing Company*, 31 S.Ct. 456, 220 U.S. 446, wherein the trade-mark involved was "Ruberoid" for a roofing paper. The plaintiff had employed this trade-mark in its business for a period of twelve (12) years prior to the time that the defendant entered the field. The defendant called its product "Rubbero". The Court, in holding that the trade-mark was descriptive and that the name "Ruberoid" was impossible of adoption as a trade-mark, stated:

"* * * The court said: 'A public right in rubberoid and a private monopoly of rubberoid cannot coexist.' The court expressed the determined and settled rule to be 'that no one can appropriate as a trademark a generic name or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it

is used to signify, others may employ with equal truth.' * * * It was said by the chief justice, speaking for the court, that 'the term (trade-mark) has been in use from a very early date; and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words; but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trademark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose.' *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 673, 45 L.Ed. 365, 378, 21 Sup. Ct. 270."

- (b) **Federal trade-mark registration does not alter inability to adopt descriptive name as trade-mark.**

The fact that appellant had acquired registrations on its alleged trade-marks here involved gives it no better standing because it has long been recognized that a registered trade-mark is not valid when the mark is used merely to describe the product or its characteristics. Certainly, the marks "Red Riding Hood", "Little Bo-Peep", "Little Miss Muffett", "Story-book" and the other marks employed by appellant are descriptive of the product and the product's characteristics. This rule was clearly expressed in the late case of *National Nu Grape Co. v. Guest*, 164 Fed. (2d)

874. In this case the trade-mark of plaintiff, which was registered in the United States Patent Office, was "NuGrape", said registration being under the Act of 1905. The defendant used the trade-mark "Tru-Grape". Both trade-marks are applied to a grape drink. The Court, in holding that plaintiff's trade-mark and registration was invalid because the same was descriptive, stated:

"It is well established that the mere registration of a term as trade-mark does not establish that term as a valid trade-mark. Registration gives rise to a presumption of validity but such presumption is rebuttable. When a trade-mark is questioned, its validity must be established. It has long been recognized that a registered trade-mark is not valid when the term used is merely descriptive of the product, or of its ingredients, qualities or characteristics. The gist or value of the trade-mark is to signify the origin or source of a product; to provide a symbol for the article to aid the manufacturer in advertising and selling. A descriptive mark is bad for two reasons: First, because it does not advise the public that the article comes from a single source; and, second, that if so, since the word is descriptive of the goods, the protection of the word as a trade-mark would be an infringement upon common speech, which, in the use of the word, likewise is descriptive."

Another late case that is applicable to the present situation is that of *Wilhartz v. Turco Products, Inc.*, 164 Fed. (2d) 731. In this case the plaintiff filed a complaint for declaratory judgment as to the right

of the plaintiff to use the mark "Auto Shampoo" and for injunction against the defendant's interference with plaintiff's use thereof. The defendant filed an answer and counterclaim in which it claimed valid Federal trade-marks registered to "Auto Shampoo" and "Car Shampoo", the registration of the latter under the law of Illinois, and alleged infringement by the plaintiff of both marks by the use of "Hurricane Auto Shampoo". The defendant marked its products with the trade-mark "Turco" and associated images with the words "Auto Shampoo" or "Car Shampoo" below. This is similar to the defendant's practice in the instant case where it employs their trade-mark "Nancy Ann" in conjunction with the alleged marks here involved. The Court, in holding that the defendant's trade-marks and registration were invalid, stated:

" 'Auto Shampoo' and 'Car Shampoo' have no subtle or fanciful meaning to us. 'Auto' and 'Car' when used with 'Shampoo' suggest only one thing to our minds, namely, some preparation for washing an automobile. These words are merely descriptive of the product to which the defendant has applied them. This seems quite apparent to us from the use made of the word 'Turco' and the associated images which predominate the design and on which design in smaller letters below are printed or pasted the words 'Auto Shampoo' or 'Car Shampoo.' For what purpose is this done? For the obvious purpose of describing the nature of the defendant's product. 'Turco' and the Turk's head and the scimitar are used to designate hundreds of the defendant's products. The

identifying descriptive words applying to the various products are inserted in less conspicuous type. Such words, so obviously merely descriptive, cannot be the subject of a valid trade-mark. *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 44 S. Ct. 615, 68 L. Ed. 1161; *Skinner Mfg. Co. v. Kellogg Sales Co.*, 8 Cir., 143 F. (2d) 895."

- (c) **Secondary meaning cannot attach to descriptive name and the District Court found as a fact that the marks here involved have not acquired a secondary meaning.**

As a matter of fact, there is a complete lack of proof of secondary meaning, the District Court finding (R 113-114):

"36.

"The defendant-counter-claimant has failed to establish by any evidence that the names 'Storybook', 'Goldilocks', 'Little Bo-Peep', 'June Girl', 'Mistress Mary', 'Curly Locks', 'Little Miss Donnett', 'Red Riding Hood', 'Little Miss Muffett', and 'Story', have become known to the public or to dealers as denoting a product of defendant-counter-claimant.

"37.

"The evidence is insufficient to establish that the names 'Storybook', 'Goldilocks', 'Little Bo-Peep', 'June Girl', 'Mistress Mary', 'Curly Locks', 'Little Miss Donnett', 'Red Riding Hood', 'Little Miss Muffett', and 'Story', have acquired a secondary meaning denoting defendant-counter-claimant as the source of the dolls to which they are applied."

There can be no doubt that the question of whether or not a trade-mark has acquired a secondary meaning is a question of fact and the burden of proving secondary meaning is upon the one who asserts it.

Can it be said, in view of appellant's failure to produce any evidence of secondary meaning that said Findings of Fact 36 and 37 are clearly erroneous? Due to such failure to sustain the burden of proof because of complete lack of evidence to establish secondary meaning, we submit that these findings are correct and such findings should not be set aside.

The Supreme Court, in discussing the establishment of secondary meaning to the trade-mark "Shredded Wheat", said that *the trade-mark owner had to establish* that the primary significance of the mark in the minds of the consuming public is not the product but the producer. In this respect the Supreme Court stated the rule in this way:

"* * * But to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer. This it has not done. The showing which it has made does not entitle it to the exclusive use of the term shredded wheat but merely entitles it to require that the defendant use reasonable care to inform the public of the source of its product."

Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 59 S.Ct. 109, 113.

It is submitted therefore that the findings of fact that no secondary meaning attached to the appellant's marks are not clearly erroneous and therefore should not be set aside.

Again the principle against the use of descriptive words as a trade-mark was expressed in the recent case of *Skinner Mfg. Co. v. Kellogg Sales Co.*, 143 Fed. (2d) 895. Here the facts were that the plaintiff adopted and owned the trade-mark "Raisin-BRAN" and registered the same in the United States Patent Office under the Trade-Mark Act of 1920. The defendants, General Foods Sales Co., Inc., and the Kellogg Company, manufactured bran flakes containing raisins and called their marks "Post's Raisin Bran" and "Kellogg's Raisin 40% Bran Flakes", respectively. Plaintiff sued defendants for trade-mark infringement and the Court held that the trade-mark "Raisin-BRAN" was descriptive, stating:

"The name 'Raisin-BRAN' is descriptive of ingredients of appellant's breakfast food. Without the raisins the product would appropriately have been called 'bran flakes' or 'bran'. With the raisins it was 'raisin bran' in the same sense that pie containing raisins is 'raisin pie,' that bread containing raisins is 'raisin bread', and that muffins containing raisins are 'raisin muffins'. At the time the appellant originated its product anyone was free to mix raisins with bran flakes and to call the combination 'raisin bran'. The name 'Raisin-BRAN' could not be appropriated as a trade-mark, because 'A name which is merely descriptive of the ingredients, qualities or characteristics of an article of trade cannot be appro-

priated as a trade-mark and the exclusive use of it afforded legal protection. The use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of the product.

* * * * * Concededly, the appellees had the right to market their products in competition with the appellant. Having that right, they also had the right to call their products 'Raisin Bran', that being an appropriate, if not the most appropriate, description of them. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 116, 117, 59 S. Ct. 109, 83 L. Ed. 73.

"The appellant contends that the evidence conclusively shows that the name 'Raisin-BRAN' had been so long used and so exclusively appropriated by it as the name of its product that the name had come to mean to the trade the particular product of appellant, and that the name had therefore acquired a secondary meaning, the effect of which was to give to the appellant the exclusive right to use it and its equivalents.

* * * * *

"It seems to us, as it did to the trial court, that the name 'Raisin-BRAN' was not shown to have acquired such a secondary significance as would justify denying to the appellees the right to use the words 'Raisin Bran' in describing their products. To preclude the appellees from using those words would be to give the name 'Raisin-BRAN' the full effect of a trade-mark, while denying its validity as such. *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, supra, 220 U.S. at page 461, 31 S. Ct. at page 460, 55 L. Ed. 536."

It must be remembered that appellant herein offered absolutely no evidence to establish a secondary meaning in its trade-marks.

(d) Character names for dolls are descriptive.

It is submitted that the generically descriptive character names of "Red Riding Hood", "Little Bo-Peep", "Little Miss Muffett" and the other names employed by appellant could, under no circumstances, delineate merely the origin or ownership of the goods of a particular manufacturer because of the fact that they have been too long associated with the well-known nursery rhyme characters which have been *publici juris* and for years and years have been a part of the mythology of the American public. Therefore, no one can acquire the exclusive right to the use of such descriptive names as a trade-mark.

The Court of Appeals for the Second Circuit in the case of *Durable Toy & Novelty Corporation v. J. Chein & Co., Inc., et al.*, 133 F. (2d) 853, 855, in discussing the trade-mark "Uncle Sam", had this to say:

"* * * Where the name is personal or the mark is coined, it will be hard indeed for the newcomer to find any excuse for invading it, even though his user does no more than vaguely confuse the reputation of the first user with his own; he has no lawful interest in adopting such a mark. But that is not this case; 'Uncle Sam' is a part of the national mythology, not entirely unlike the flag, or any other part of our inherited patriotic paraphernalia; all have a measurable interest in its

use. Indeed the very fact that it has been thought necessary to forbid the use of the flag for advertising, is evidence that the use had a value, 4 U.S.C.A. § 3; § 1425 (16) N.Y. Penal Law Consol. Laws N.Y.C. The figure and name of 'Uncle Sam' are not indeed the objects of the same national piety, but there is nevertheless apparently some advantage in exploiting them, and, while it remains lawful to do so, the advantage is not negligible. Balanced against any possible damage to the plaintiff's reputation among buyers for retailers, we think it should prevail. If the plaintiff had wished a truly proprietary sign, it needed only slight ingenuity to contrive one which would have protected it without question. * * *

This particular principle of law was succinctly expressed by the Court of Appeals for the Third Circuit in the case of *Cridlebaugh v. Rudolph*, 131 Fed. (2d) 795. The trade-mark involved in this case was "Specs" on blinders to be used on chickens. The Court, in expressing the rule, stated:

"The purpose of a trade-mark is to indicate the origin or ownership of the particular goods to which it is affixed. *Elgin National Watch Company v. Illinois Watch Case Company*, 179 U.S. 665, 673, 21 S. Ct. 270, 45 S. Ct. 365. Inasmuch as the meaning of a descriptive word cannot be so delimited as to describe merely the origin or ownership of the goods of a particular manufacturer, no one can acquire the exclusive right to the use of such a word as a trade-mark. *Canal Company v. Clark*, 13 Wall. 311, 80 U.S. 311, 323, 20 L. Ed. 581. In short, a mark which is no more

than descriptive is not a valid trade-mark at common law. *William R. Warner & Company v. Eli Lilly & Company*, 265 U.S. 526, 528, 44 S. Ct. 615, 68 L. Ed. 1161; *New York & New Jersey Lubricant Co. v. O. W. Young*, Err. & App., 84 N.J. Eq. 469, 470, 94 A. 570; *Mississippi Wire Glass Co. v. Continuous Glass Press Co.*, Ch. 79 N.J. Eq. 277, 279, 81 A. 374; *Restatement, Torts* (1938), Sec. 721. Nor may the word, being merely descriptive, be said to acquire a preemptive secondary meaning. *Mississippi Wire Glass Co. v. Continuous Glass Press Co.*, loc. cit. supra. In this case the word 'Specs' is but a figurative description of the plaintiff's articles of manufacture and does not grow out of either the origin or ownership of the goods. The designation, therefore, does not entitle the plaintiff to the exclusive use of the word or its synonyms.

* * * * * *

"Likewise, the failure to establish a case of trade-mark infringement is fatal to the plaintiff's claim of unfair competition for the latter is based entirely upon the defendant's use of the word 'Goggles.'"

The character names here involved are similar to the name "Mark Twain" of which this Court said:

"We think the name Mark Twain is incapable of acquiring a secondary meaning in connection with Literary Property. The name Mark Twain, from a literary standpoint, indicates only the writings of Samuel L. Clemens, which is a primary meaning."

Chamberlain v. Columbia Pictures Corp., 186 F. (2d) 923.

Even though the name "Mark Twain" was used in connection with literary property, the rule of law stated by this Court respecting incapability of acquiring a secondary meaning is here applicable. "Red Riding Hood," "Little Miss Muffett," "Little Bo-Peep", "Mistress Mary", "Little Miss Donnett", "Curly Locks", and "Goldilocks", all, when used to identify a doll representing a fictional nursery rhyme or storybook character, are used in their primary meaning.

**THE APPELLEES HAVING THE RIGHT TO IDENTIFY THEIR
DOLL PRODUCTS WITH THEIR DESCRIPTIVE NURSERY
RHYME CHARACTER NAMES CANNOT BE GUILTY OF UN-
FAIR COMPETITION.**

After quite a bit of prodding, Mr. Rowland on his cross-examination finally admitted at R 393 that the dress of appellee Dollcraft Co.'s packages for their dolls was not similar to that of appellant. This testimony was drawn from Mr. Rowland with considerable difficulty and is as follows:

"Q. I call your attention to your deposition of page 70, commencing on line 12:

'Q. Now, before recess we were discussing the similarity between the dolls put out by the plaintiff and the dolls put out by the defendant under the various names of fictional characters as designated in the pleadings, and inquired into the similarity and appearance of them, and I should like to ask you at this time, you do not contend that there is any similarity in the appearance of the packages?

A. No, sir, I do not.'

Wasn't that question asked and that answer given?

A. That is correct; there is no similarity in the likeness of the boxes, but it is the overall idealogy that has been copied."

Also at R 392 Mr. Rowland testified in this manner:

"Q. For example, let's take part of them. You don't package your dolls in bottles?

A. No, I should say not."

It is also true that the appellee, Dollcraft Co.'s name appears prominently on each of the packages in which is packed its dolls (for example see Exhibits 30-42), and no one can be confused in purchasing one of appellees' dolls that it is a product of Nancy Ann Storybook Dolls, Inc.

The basis of appellant's charge of unfair competition as against appellees rests upon infringement by appellees of appellant's alleged trade-marks. If the charge of trade-mark infringement fails, which, under the authorities above cited, it must, then there is no ground upon which to charge the appellees with unfair competition. If there is some confusion by reason of the fact that two people use descriptive language in truthfully identifying their product, such confusion, in the absence of false representations and fraud, is not actionable.

On this point the District Court found (R 114):

"38.

"Both parties hereto are producing dolls of similar size and common conception. There is a

natural resemblance between their products which may result in mistake as to origin or ownership. No fraudulent representations with respect to the origin of the products of plaintiff-counter-defendant have been made."

The Supreme Court so held in *Del. & H. Canal Co. v. Clark*, 13 Wall. 311, where it stated:

"* * * True, it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false misrepresentations, and equity will not enjoin against telling the truth."

The case of *Cridlebaugh v. Rudolph*, 131 Fed. (2d) 795, expresses the rule in the following language:

"Likewise, the failure to establish a case of trade-mark infringement is fatal to the plaintiff's claim of unfair competition for the latter is based entirely upon the defendant's use of the word 'Goggles'."

The Supreme Court in the case of *William R. Warner & Co. v. Eli Lilly & Co.*, 44 S.Ct. 615, 616, wherein the facts were that the plaintiff began in 1899 to manufacture a liquid preparation of quinine in

combination with chocolate and marketed it under the name of "Coco-Quinine," held said mark descriptive and invalid. In said case defendant, in 1906, began the manufacture of a liquid preparation which was substantially the same as plaintiff's and put it upon the market under the name of "Quin-Coco". The Supreme Court, in holding that the name "Coco-Quinine" and also the name "Quin-Coco" were descriptive and even though confusion might result between the two names no damage resulted, stated:

"* * * A name which is merely descriptive of the ingredients, qualities or characteristics of an article of trade cannot be appropriated as a trade-mark and the exclusive use of it afforded legal protection. The use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of the product. * * *"

Still another late case in point is that of *Coca-Cola Co. v. Snow Crest Beverages, Inc.*, 162 Fed. (2d) 280. In this case the defendant employed the trade-mark "Polar Cola" while plaintiff owned the trade-mark "Coca-Cola". The defendant sold its Polar Cola to bars, and when people who were customers of the bars asked for a Cuba Libre or Rum and Cola or "Coke", on occasions the bartenders would substitute Polar Cola for Coca-Cola. The Court, in discussing the question of whether or not this amounted to unfair competition on behalf of the defendant, stated the following:

“* * * All the defendant did, therefore, to make substitution by bartenders possible was to manufacture a drink almost if not quite identical with the plaintiff's, which it had an established legal right to do, and all it did to make such substitution likely was to sell its drink at about half the price of the plaintiff's, which it certainly was within its rights in doing. It seems to us to go without saying that such conduct on the defendant's part falls far short of constituting the legal wrong described in *Warner & Co., v. Lilly & Co.*, 265 U.S. 526, 530, 531, 44 S. Ct. 615, 68 L. Ed. 1161, of designedly enabling and inducing its retail dealers to defraud their customers by palming its product off on them as the plaintiff's.”

As the Commissioner of Patents said in the case of *Nancy Ann Dressed Dolls v. Ippolito*, 77 U.S.P.Q. 545, 547:

“‘Certainly every producer of dolls is entitled *freely* to make and sell his conception of nursery rhyme characters familiar to all from childhood. And it is fundamental that the common right to make any article is inseparable from the right to employ words which aptly describe it.’”

It is submitted that the appellees herein cannot be guilty of unfair competition due in any respect to the fact that appellee Dollcraft Co. employs descriptive character names from the Nursery Rhymes or children's storybooks for their dolls.

VALIDITY OR INVALIDITY OF APPELLANT'S TRADE-MARKS
NOT IN ISSUE WHEN APPELLANT WAS INVOLVED IN
OPPOSITION PROCEEDINGS BEFORE THE PATENT OFFICE,
BUT EXAMINER IN PATENT OFFICE CAN RULE ON PRO-
PRIETY OF APPLICANT'S MARK IN SUCH PROCEEDINGS.

The appellant, on page 25 of its brief, admits that in the opposition proceedings before the Patent Office the validity of its trade-marks could not be attacked, where it stated:

“The validity of the Nancy Ann registrations was not an issue before the Court, and could not be passed upon.”

It is true, however, that in an opposition proceeding, as in the *Ippolito* proceedings herein referred to, the examiner and the Commissioner of Patents have the right to review the propriety of issuing a registration on an application then pending before the Patent Office because in such a case the Patent Office still has jurisdiction of the pending application and can, therefore, refuse registration of said application on a basic ground such as descriptiveness.

This rule is clearly enunciated in the case of *Nancy Ann Dressed Dolls (Nancy Ann Storybook Dolls, Inc., assignee substituted) v. Ippolito*, 77 U.S.P.Q. 545-546, as follows:

“In addition to finding that opposer was entitled to maintain its opposition for the foregoing reasons, the Examiner of Interferences proceeded ex parte to consider applicant's mark and to refuse it on the ground of its descriptiveness. This ex parte holding is challenged, it being contended that the words are not descriptive of the goods and that neither the Examiner of

Interferences nor this Office on appeal has authority to make such ex parte ruling in such a matter.

“As to the right of the examiner to consider this ex parte issue with reference to applicant’s mark there can be no question but that it is not only the examiner’s right but his duty to consider this in an appropriate case. *Schering & Glatz, Inc. v. Sharp & Dohme, Incorporated*, 32 C.C.P.A. 827, 146 F.2d 1019 (64 USPQ 394), *Columbia Broadcasting System, Inc. v. Technicolor Motion Picture Corporation (C.C.P.A.)*, 166 F.2d 941, 77 USPQ 160.

“* * * It is therefore clear that it was not only the examiner’s right but his duty to determine this point without reference to the issues of the opposition proceeding so that an apparent prima facie exclusive right to such descriptive term might not be granted to applicant in the event of any disagreement with the holding as to opposer’s rights to sustain the opposition.”

APPELLANT, BY SENDING THREATENING LETTERS TO NUMEROUS CUSTOMERS OF APPELLEE, DOLLCRAFT CO., FORCED SAID APPELLEE TO ACT IMMEDIATELY TO PROTECT ITS TRADE.

The appellant was not satisfied with sending a notice of infringement to appellee, Dollcraft Co., but sent numerous threatening letters to customers of appellee, Dollcraft Co. (R 201-206.) As was natural, in such cases, these threatening letters were immediately referred to appellee, Dollcraft Co., and, in

many instances, the appellant's conduct resulted in appellee Dollcraft Co.'s customers returning merchandise to said appellee, Dollcraft Co. (R 201-206, inclusive.) Appellant timed the sending of these letters so they would coincide with the 1949 Christmas buying rush. Appellant undoubtedly knew that its action in sending such threatening letters would have the result of causing customers of appellee, Dollcraft Co., to return merchandise. If appellant had a legitimate complaint against the appellees herein, the simple course for it to follow would have been to file an action for trade-mark infringement to determine its rights in the premises.

The contentions made by appellant in its brief, under the heading, "Appellees Have Planned And Pursued A Deliberate Course of Unfair Competition", is nothing but pure fabrication.

It is noteworthy that although appellant in this chapter of its brief, covering fifteen pages, makes numerous statements with respect to factual matters, there is not a single reference to the transcript in support of such matters. The entire charge is made out of "whole cloth".

The District Judge, after hearing the evidence, made the following findings of fact (R 112-116):

"29.

"Plaintiff-counter-defendant, Dollcraft Co., first packaged its dolls in individual cardboard boxes which had a red top and a white bottom. Later it began using and now uses a box with a white

bottom and a transparent, acetate top and also, for one series of its dolls, uses individual glass bottle containers.

“30.

“Plaintiff-counter-defendant, Dollcraft Co., beginning in 1946 or 1947, applied to the red-topped boxes containing its dolls, a gummed label or seal on which the following words appeared: ‘Globe Trotters, Doll-Craft Co., San Francisco, California.’ Later the boxes were rubber-stamped with the words, ‘Dollcraft Company, Santa Clara, California.’ The lids of the glass containers have, since they were first used in 1949, contained the words, ‘Dolls With a Story by Dollcraft, Santa Clara, California.’

“31.

“Defendant-counter-claimant packages its dolls in individual white cardboard boxes printed on which, in multiple diagonal lines, are the words, ‘Nancy Ann Storybook Dolls,’ between which lines are additional parallel lines of large polka dots with both the words and the polka dots printed in a single color.

“32.

“The packages in which plaintiff-counter-defendant, Dollcraft Co., sells its dolls are clearly distinguishable from the packages in which defendant-counter-claimant sells its dolls.

“33.

“There is no likelihood of mistaking the packages of plaintiffs-counter-defendants for those of

defendant-counter-claimant nor the origin of such packages.

* * * * *

“38.

“Both parties hereto are producing dolls of similar size and common conception. There is a natural resemblance between their products which may result in mistake as to origin or ownership. No fraudulent representations with respect to the origin of the products of plaintiff-counter-defendant have been made.

“39.

“That the evidence fails to show any likelihood of confusion in the ultimate customers between the products of plaintiff-counter-defendant, Dollcraft Co., and the products of defendant-counter-claimant, Nancy Ann Storybook Dolls, Inc.

“40.

“There is no evidence that there was any confusion in the trade between the products of defendant-counter-claimant and the plaintiffs-counter-defendants.

“41.

“There is no evidence that there was any likelihood of confusion in the trade between the products of defendant-counter-claimant and the plaintiffs-counter-defendants.

“42.

“In October, 1949, two retail stores advertised plaintiff-counter-defendant, Dollcraft Co.’s dolls,

including 'Red Riding Hood,' 'Little Bo-Peep,' and 'Sugar and Spice' under the names of 'Story Dolls' and 'Story Book Dolls.' Immediately thereafter, defendant-counter-claimant served notices of alleged trade-mark infringement upon plaintiff-counter-defendant, Dollcraft Co., and certain customers of said plaintiff-counter-defendant, including the two stores which had so advertised, demanding that plaintiff-counter-defendant, Dollcraft Co., and its customers cease their trade-mark infringement and unfair competition and account for all profits derived from such practices.

"43.

"There is no evidence in the record that plaintiffs-counter-defendants practiced any fraud against defendant-counter-claimant in the manufacture and sale of its doll products.

"44.

"There is no evidence in the record that plaintiff-counter-defendant, Dollcraft Co., has represented by marks, signs, labels, colors, packages or in any other way that its dolls are manufactured by defendant-counter-claimant; on the contrary, the evidence shows that plaintiff-counter-defendant, Dollcraft Co., identifies its products by its own name clearly and unmistakably.

"45.

"The evidence establishes that as between the products of plaintiff-counter-defendant, Dollcraft Co., and defendant-counter-claimant that the dissimilarities outweigh the similarities, and plain-

tiff-counter-defendant, Dollcraft Co., has not unfairly competed with defendant-counter-claimant and has the right to use the descriptive names 'Storybook,' 'Goldilocks,' 'Little Bo-Peep,' 'June Girl,' 'Mistress Mary,' 'Curly Locks,' 'Little Miss Donnett,' 'Red Riding Hood,' 'Little Miss Muffet,' and 'Story.'

"46.

"That the evidence establishes that the plaintiff-counter-defendant, Dollcraft Co., did not unfairly compete with defendant-counter-claimant.

"47.

"That the evidence establishes that plaintiff-counter-defendant, Lester F. Hinz, did not unfairly compete with defendant-counter-claimant.

"48.

"That the evidence establishes that the plaintiff-counter-defendant, Robert E. Kerr, did not unfairly compete with defendant-counter-claimant."

The findings were made after the District Court heard and saw the witnesses testify, and they are neither contrary to the evidence nor are they clearly erroneous; therefore they must stand.

Certainly, the appellant's unsupported statements, wholly fabricated, can carry no weight to overthrow the findings of the District Court. The attempts of appellant to create, without record references, a "straw man" in support of its fictional theory is entitled to no weight.

The statement that appellee, Dollcraft Co., had a complaint ready to file is ridiculous and is entirely without foundation. The fact is that when a number of appellee Dollcraft Co.'s customers received notices of trade-mark infringement and unfair competition from appellant, they naturally notified said appellee and demanded that the merchandise be returned. (R 201 to 206.) It was necessary for appellee, Dollcraft Co., to act immediately or be put out of business.

If appellant thought it had been damaged and desired to pursue the proper remedy, it should have followed the normal course and filed a complaint against appellee, Dollcraft Co.,—not send a multitude of notices threatening customers—to destroy its business.

In the case of *Robbins v. Ira M. Petersime & Son*, 51 Fed. (2d) 174, 178, the Court of Appeals for the Tenth Circuit, in condemning the practice of sending customers threatening letters, said:

“To be sure, plaintiffs had a right to sue any and all the users of defendant’s incubators as long as they acted in good faith, but several letters of plaintiffs’ counsel written to defendant’s users were more than notices of an intention to sue the addressee as an infringer. They contained demands and were in the nature of threats; * * *”

A case quite similar to the present one is that of *Thierfeld et al. v. Postman’s Fifth Avenue Corporation, et al.*, 37 Fed. Supp. 958. In this case the trade-mark involved was “Corde” for embroidery. The Court, in discussing the descriptiveness of the mark

and holding that the sending of threatening letters was improper, stated:

“It is stated therein that ‘Corde’ is a well known type of embroidery which is also known by similar sounding words; that such words have been commonly and extensively used in France and in the United States to describe it; that for many years plaintiffs’ trade-mark has been *publici juris*, used by defendants and others and is considered a common word; that plaintiffs, with knowledge of the above, appropriated the word, registered it under the 1920 Act, claim exclusive rights thereto, and wrongfully threaten defendants, and defendants’ customers and others with suit, etc.

* * * * *

“* * * The right existed at common law to enjoin a person from wrongfully asserting title to a word which was public property, and from interfering with the business and rights of others. *Glen & Hall Mfg. Co. v. Hall*, 61 N.Y. 226, 19 Am. Rep. 278. Threatening defendants’ customers with infringement suits, when done in bad faith would sustain the granting of an injunction. *Warren Featherbone Co. v. Landauer*, C.C., 151 F. 130.”

APPELLEES, LESTER F. HINZ AND ROBERT E. KERR, ARE NOT
GUILTY OF TRADE-MARK INFRINGEMENT OR UNFAIR
COMPETITION.

It is submitted that the said Lester F. Hinz and Robert E. Kerr are not guilty of trade-mark infringement or unfair competition.

Based on the evidence the District Court found (R 115-117) :

“43.

“There is no evidence in the record that plaintiffs-counter-defendants practiced any fraud against defendant-counter-claimant in the manufacture and sale of its doll products.”

* * * * *

“49.

“That the evidence establishes that plaintiff-counter-defendant, Lester F. Hinz, did not infringe valid trade-mark rights of defendant-counter-claimant.

“50.

“That the evidence establishes that plaintiff-counter-defendant, Robert E. Kerr, did not infringe valid trade-mark rights of defendant-counter-claimant.

“51.

“That the evidence fails to establish that plaintiff-counter-defendant, Dolleraft Co., is the alter ego of plaintiffs-counter-defendants, Lester F. Hinz and Robert E. Kerr.”

The basis of appellant's contention to the contrary (Brief for Appellant, page 34) is that confidential information was secured by Lester F. Hinz and Robert E. Kerr from appellant, and also that Lester F. Hinz and Robert E. Kerr were instrumental in organizing Dolleraft Co. as their alter ego to avoid individual liability. With respect to the first contention,

the testimony of Allan L. Rowland, secretary-treasurer of appellant company, blasts any such theory and completely refutes the allegations in this respect in the counterclaim. (See R 376-378, 383-385.)

Appellant further contends (Brief for Appellant, page 34) that Dollcraft Co. is the alter ego of Lester F. Hinz and Robert E. Kerr because Lester F. Hinz and Robert E. Kerr own a controlling stock interest in said company. Such ownership of a controlling stock interest is not sufficient grounds upon which to hold that a corporation is the alter ego of said controlling stockholders. Appellant offered no evidence on this point other than said stock ownership.

The leading case in California, and this question must be determined according to California law, is that of *Erkenbrecher v. Grant*, 187 Cal. 7, 11, 200 Pac. 641, in which the rule was laid down that merely because one or more persons own or control the capital stock of a corporation does not and should not destroy its separate existence. In that case the Court said:

“In order to set aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it ‘merely an instrumentality, conduit, or adjunct’ of its stockholders, but it must further appear that they are the ‘business conduits and alter ego of one another,’ and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere

circumstance that all the capital stock of a corporation is owned or controlled by one or more persons, does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization."

The rule enunciated in the foregoing case was recently reaffirmed and quoted by the Supreme Court of the State of California in the case of *Hollywood Cleaning and Pressing Co. v. Hollywood Laundry, Inc.*, 217 Cal. 124, 17 Pac. (2d) 709, 711. In that case, as here, the contention was made that the defendant was the alter ego of one of the defendants who was its sole stockholder. Therein there were many more facts and circumstances alleged and proved which might have led the Court to conclude that the corporation was but the alter ego of its sole stockholder than are found herein, but the Court refused to so conclude and said:

"Whatever may be the rule in other jurisdictions, the rule is well settled in this state that the mere fact one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the last corporation and to treat it as the alter ego of the individual or corporation that owns its stock. In addition it must be shown that there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that

the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence.”

The same rule was expressed in somewhat different language in the case of *Wiseman v. Sierra Highland Mining Co.*, 17 Cal. (2d) 690, 111 Pac. (2d) 646, 651, as follows:

“In their reliance on the alter ego doctrine to support their contentions of fraud, the interveners cite and quote from *Clark v. Millsap*, 197 Cal. 765, 781, 242 Pac. 918; *Sunset Farms, Inc. v. Superior Court*, 9 Cal. App. (2d) 389, 406, 50 Pac. (2d) 106, 114, and other cases.

“In such cases the courts have recognized that fraud must be proved before relief may be accorded; that the mere fact that a corporation is the alter ego of an individual is not sufficient, but that when it is shown that the separate entity was ‘fabricated and assumed for the purpose of perpetrating a fraud, a court of equity is justified in disregarding the corporate fiction in order to reach the individual and fasten upon him liability for his fraudulent action.’ ”

No proof was made before the District Court to establish that Dollcraft Co. was organized as the alter ego of Hinz and Kerr. The facts establish that appellee, Dollcraft Co., was engaged in the business of manufacturing nursery rhyme character dolls which

were so known in the industry long prior to any association of Hinz and Kerr with said Dollcraft Co.

It is therefore submitted that appellant's attempt to subject Hinz and Kerr to personal liability on the theory that they own a controlling stock interest in appellee, Dollcraft Co., is improper.

Proof of the charges made by appellant in its brief respecting unfair competition must be supported by evidence. Mere argument based on speculation, conjecture and false charges can carry little weight in attempting to set aside findings of fact made by the District Court when said findings are supported by substantial evidence based on oral testimony taken in open Court.

**STORK CLUB CASE NOT APPLICABLE TO FACTS
OF INSTANT ACTION.**

The appellant has cited at great length from and relies mainly on the case of *Stork Restaurant, Inc. v. Sahati*, 166 F. (2d) 348. This case has no application to the instant action because the facts of the two cases are in no way similar. First, the *Stork* case involved a trade-name and not a trade-mark; secondly, this Court held definitely that the trade-name, "The Stork Club" was "odd," "fanciful," "strange," and "truly arbitrary"; third, it was established that the Stork Restaurant had spent more than \$700,000 over a period of eleven years in advertising on a nationwide scale the trade-name "The Stork Club" and, fourth,

that the trade-name, "The Stork Club" had definitely acquired a secondary and fanciful meaning. None of these facts are present herein and therefore it is submitted that the *Stork* case is not applicable to the instant case.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court be affirmed and this appeal dismissed.

Dated, San Francisco, California,
November 14, 1951.

Respectfully submitted,

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No. 12,953

United States Court of Appeals
For the Ninth Circuit

NANCY ANN STORYBOOK DOLLS, INC., a
corporation,

Appellant,

vs.

DOLLCRAFT COMPANY, a corporation;
LESTER F. HINZ and ROBERT E.
KERR,

Appellees.

REPLY BRIEF FOR APPELLANT.

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vs.

DOLLCRAFT COMPANY, a corporation;
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KERR,

Appellees.

REPLY BRIEF FOR APPELLANT.

In order that there be a just disposition of the issues in this proceeding, and in view of the importance of the matter to the appellant, it is deemed to be necessary to make a full reply to the brief of the appellees.

There are two distinct aspects to the present controversy. We have the question of trade-mark rights and an infringement thereof, and we have the matter of a definite program of unfair competition in connection with the marketing of dolls.

It is agreed, therefore, that we have two questions to answer.

1. Are the appellant's trade-marks valid and infringed by appellees?
2. Have appellees competed unfairly with appellant?

Since the question of unfair competition is much broader in scope than the question of trade-mark infringement, it would seem advisable first to take up point number 2, so that we may have in mind clearly the relationship of the parties.

THE APPELLEES ARE GUILTY OF UNFAIR COMPETITION.

The appellant in no sense seeks a trial *de novo* before this Court, but contends that the Findings of Fact and Judgment of the District Court are not supported by substantial evidence, and contends that the District Court erred in construing the evidence, and failed entirely to properly evaluate the meaning of the unfair acts of the appellees in their use of the appellant's trade-marks, and erred in failing to understand the significance of the adoption and use of the trade-marks of the appellant or the scope of protection that should be afforded to these trade-marks, and failed to recognize the legal significance of the doctrine of descriptiveness as applied to trade-marks. It is the purpose of the appellant to point out convincingly that the appellant has well-defined rights in the several trade-marks under consideration, and is entitled to protection against a subtle and deliberate form of poaching.

Since the appellant believes that the Judgment and Findings of Fact are not supported by substantial evidence, all material questions relating thereto may now be considered.

With regard to proper action under Rule 52, we find in Section 1129 of Federal Practice and Procedure by Barron and Holtzoff that:

“Rule 52(b) permits the unsuccessful party to raise on appeal the question of the sufficiency of the evidence to support the findings ‘whether or not the party raising the question has made in the district court an objection to such finding or has made a motion to amend or a motion for judgment’. In other words, when findings of fact are made in a case tried without a jury the sufficiency of the evidence to sustain the findings may be challenged without having made ‘objection to such findings’ or ‘motion to amend them or a motion for judgment’.”

See:

Bingham Pump Co. v. Edwards, C.C.A. 9th, 1941, 118 F. (2d) 338, certiorari denied 62 S. Ct. 107, 314 U.S. 656, 86 L. Ed. 525;

Monaghan v. Hill, C.C.A. 9th, 1944, 140 F. (2d) 31;

In re Imperial Irr. Dist., D.C. Cal., 1941, 38 F. Supp. 770, affirmed 136 F. (2d) 539, certiorari denied 64 S. Ct. 784, 321 U.S. 787, 88 L. Ed. 1078, rehearing denied 64 S. Ct. 940, 322 U. S. 767, 88 L. Ed. 1593.

The appellant contends that it was manifest error on the part of the trial Court to fail completely to

understand the fact that a trade name or mark may serve a dual function. It is a common practice to use a single mark for a single product, and at the same time that mark may also identify the product itself. This is particularly true in the business of manufacturing and merchandising toys, games, dolls and the like, and it is of vital importance to recognize ordinary business customs and usages over a very long period of time. A mark may indicate origin of the goods to purchasers and, at the same time, identify the product itself. Such a mark may be entitled to full protection against what is actually culpable unfair competition, that is the use of the same mark by others to palm off an inferior product on the unwary or confused purchaser. Surely, it is the duty of our Courts to protect a legitimate business operation from this type of trespass.

This case concerns the adoption and use of a set of trade-marks or trade-names for the purpose of identifying the miniature dolls manufactured and sold by the appellant. We are particularly concerned with the following:

STORYBOOK

GOLDILOCKS

LITTLE BO-PEEP

JUNE GIRL

MISTRESS MARY

CURLY LOCKS

LITTLE MISS DONNETT

RED RIDING HOOD

LITTLE MISS MUFFET

STORY
FAIRYLAND
SUGAR AND SPICE

It will be observed that the appellant (Def. Ex. H, H-1 to H-14) has adopted and used in its business a considerable number of identifying trade marks and names, and that the record indicates clearly that those marks listed above constitute a most valuable group to the appellant, by reason of the fact that the dolls sold under these marks proved to be most popular.

The witness, Allan Rowland, testified (Rec. p. 321) as follows:

“Q. What can you say as to the sales of nursery rhyme and fairyland sales?

A. An actual tabulation would probably show that they are very much larger than the other dolls; in other words, fairy-tale and nursery-rhyme dolls and the Mother Goose series are the most popular; probably they sell about, on the Mother Goose series, they sell on the ratio of about 18 to 1.”

And as to volume (Rec. p. 314) as follows:

“Q. What is the tabulation that you have prepared?

A. \$8,744,384.97.

Q. How was that tabulated?

A. By years.

Q. By years?

A. Yes, sir, starting at \$16,000 for 1937, and then on up to 1949 there was a million and a half in sales.

The Court. In dollars?

A. Yes.”

Successful business always breeds imitation. While it may be true that the act of copying is not of itself wrongful, nevertheless it should be scrutinized carefully, especially when such copying involves a material matter, such as the profitable sale of goods. The appellees did not originate a line of their own, but the record shows clearly that three individuals associated closely in one way or the other with the appellant, put their heads together, and not only copied the line of miniature dolls, but more than that, chose to copy the most popular identifying marks featured by the appellant. This could hardly be a happenstance. The Findings of Fact are indeed contrary to the evidence and to a reasonable interpretation of the evidence.

UNFAIR COMPETITION ESTABLISHED BY RECORD.

With regard to the basis of actions for unfair competition in trade, it is interesting to note that *Nims* in his *Unfair Competition and Trade-Marks* (Vol. 1, page 67, 4th Ed.) states:

“In *Shaver v. Heller*, (108 F 821, 826, 65 LRA 878), it was held that suits for infringements of trade-marks rest upon ownership of the trade-marks, whereas suits for unfair competition are founded upon the damage caused by the fraudulent passing off of the goods of one manufacturer for those of another; that in suits for trade-mark infringement title to the trade-mark is indispensable to a good cause of action, but that in suits for unfair competition ‘no proprietary interest in the words, names or means by which

the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom—the good-will of a business and that this good-will is injured, or is about to be injured, by the palming off of the goods of another as his.’

There is no basic conflict between the theory that unfair competition rests on the fraud involved in acts that cause passing off, and the theory that property rights may exist in names and devices that are not trade-marks. The use of the latter is not fraudulent, and is not unfair competition unless a prior user has a special interest in such name or symbol which is different from the rights in it which are shared by all. Such a special interest is similar in nature to the interest that a trade-mark owner has in his fanciful trade-mark. It may be said that this interest is property and therefore entitled to protection, or that it is protected and therefore is property, for that reason, if for no other.”

It is to be noted that paragraphs 46, 47 and 48 of the Findings of Fact and paragraph XI of the Judgment are to the effect that the appellees have not competed unfairly with the appellant, and it is submitted that this is certainly contrary to any logical inference that may be drawn from the evidence and to any reasonable interpretation of the statements and the acts of the parties involved, as demonstrated convincingly by the following.

The party, Robert Kerr, had every opportunity to learn which of the marks of the appellant enjoyed the most popularity in the trade. See Rec. p. 417.

“Q. Were you formerly employed by the Nancy Ann Doll organization?

A. Yes, sir.

Q. For how long a period were you employed there?

A. From 1939 until the beginning of 1945.”

The party, Lester Hinz, supplied doll bodies to the appellant over a period of years. See Rec. p. 428, p. 431.

“Q. How long have you been connected with the doll business?

A. Since 1941.”

and

“Q. How long after the termination of your working arrangement with Mr. Rowland was it that you formed the partnership with Mr. Kerr?

A. Well, my working arrangement with Mr. Rowland or the Nancy Ann Doll Company terminated in 1944, and it was some time in 1945 that I recollect that Mr. Patterson sold dolls for Kerr & Hinz.”

It is important to recognize the part played by a former successful salesman of the dolls of the appellant, as shown by the evidence. See Rec. p. 210.

“Q. Where did Mrs. Juster secure the little doll bodies that she used for dressing her first set of dolls?

A. From Mr. Patterson.

Q. Who is Mr. Patterson?

A. Mr. Patterson is an old friend of the family, and at that time he was selling undressed dolls for Kerr and Hinz of Santa Clara.”

and Rec. p. 213:

“Q. When did he begin his activities selling for you?

A. Well, he procured that order from Joseph Horne for us, and that was in 1947, the latter part of 1947.

Q. Is that one of the orders that has been identified in this proceeding?

A. Yes, the ‘Hansel and Gretel’ order.”

and Rec. p. 221:

“Q. Were you aware that he had been quite successful in selling the ‘Nancy Ann’ dolls?

A. I was aware of that.”

and also note Rec. p. 222:

“Q. Did you ever discuss the sales of any of your doll products with Mr. Patterson?

A. Why, sure.

Q. And did he ever have any suggestions to make as to which dolls should be continued and which ones should be dropped?

A. Yes, he would tell me that certain things weren’t selling, and don’t make them any more for our own good. Naturally I followed his expert advice.”

With respect to the actions of Patterson, the witness Rowland (Rec. p. 375) testified on behalf of the appellant as follows:

“Q. Did you consider it unfair of Mr. Patterson to also handle and continue to handle a line of undressed dolls?

A. Any time a representative who is working for you handles another line, whether it is com-

petitive or not, and doesn't tell you about it, it is unfair. No firm would stand for it."

The result of the policy of copying by the appellees is plain enough, although the District Court chose to disregard the evidence relating thereto. The matter of the palming off and substitution of goods is never done openly and is never acknowledged by the parties involved, but actions speak louder than words. In this connection, it is clear that we are concerned not merely with the affirmative acts of the appellees, but also with the fact that the appellees have put into the hands of others, such as retailers and dealers, the means of substituting the dolls of the appellees for the dolls of the appellant.

The record shows that over a period of years the trade-marks of the appellant had been advertised throughout the United States (Def. Ex. J-1 to J-5) and there can be no doubt about the recognition of these marks in the trade.

Now it is to be noted (Def. Ex. K) that there was an advertisement in the Vallejo News Chronicle on November 21, 1949 on behalf of the appellees in which the terms Story Dolls, Red Riding Hood, Little Bo-Peep and Sugar and Spice were featured. Following the publication of this advertisement, purchases were made at Macy's in San Francisco. See the testimony of Giordano and McIver (Rec. p. 337 to 345) which establishes one instance of confusion and substitution. As will be noted from the sales slip (Def. Ex. L), the clerk at Macy's wrote the trade-marks of the

appellant, Storybook, Little Bo-Peep and Sugar and Spice on the slip. An examination of the sales slip (Def. Ex. M) concerns a similar incident. It is obvious that the use of the same and similar marks for the same line of products, miniature dolls, could only produce confusion in the trade in connection with the selling and buying of the dolls, all this to the detriment of the appellant.

**ACTS OF APPELLEES INDICATE DELIBERATE INTENT
TO COMPETE UNFAIRLY.**

There is not a shred of evidence in the record to establish a common use of any one of the marks under consideration as applied to dolls prior to the adoption and use of these marks by the appellant. The statements of counsel referring to a descriptive use or common use of the marks do not in any sense of the word constitute evidence. Any reference made to fictional characters used for trade purposes (Rec. pp. 273, 274) is plainly immaterial in this proceeding, since obviously of recent origin and subject to question.

With regard to the established business of the appellant, see Rec. p. 304:

“Q. Beginning with the small production which you say you began with back in 1937, what can you say as to the growth of your company and the expansion of its production?

A. Well, from 1937 to the present day we have made about ten million dolls.

Q. And that sale has been continuous over the period from 1937 to the present time?

A. Yes, sir, it has.

Q. Over what territory do you sell those dolls?

A. Well, practically all over the world and all the United States and Canada, England, South Africa, the Philippines, Occupied Japan."

There is no evidence in this record showing any unquestioned adverse use of the trade-marks of the appellant here under consideration prior to the establishment of the business of the appellant and the success of that business in a particular field. The trial Court erred in failing to conclude from the evidence presented that the trade-marks of the appellant were well known and well recognized in the trade over a period of years before the appellees entered the field and copied the most popular marks of the appellant.

As late as 1948, and with obvious intent, the appellees placed on the market a group of dolls without identification, purporting to depict certain fictional characters. See Rec. p. 228:

"Q. The 'Who Am I Series' was first introduced in 1948, was it not?

A. Yes.

Q. And can you state positively that it was not Mr. Patterson's suggestion that you add the 'Who Am I Series'?

A. No, I won't be pinned down like that.

Q. You couldn't say that he didn't make the suggestion?

A. No, I won't say that he didn't; I won't say that he did—he did or he didn't.

Q. Mr. Patterson was representing you as a sales representative at the time you first put the 'Who Am I Series' out, was he not?

A. Yes."

The inference is strong from the record that the sale of dolls without names was a test, and the excuse given for the use of the series of marks is flimsy in view of the circumstances of the case. See Rec. p. 239:

"Q. Were you aware that the characters which you depicted by those dolls or intended to depict by them had been made the subject of trade-mark registrations of the Nancy Ann organization?

A. Yes.

Q. You were aware of that. Was that one of the reasons that you avoided applying the name to the box or to the doll?

A. No. If I wanted to put the name on, I would have done it, just like some of the other doll companies did.

Q. And just as your company ultimately did?

A. They were—as I told you before, Mr. Orr, they were only brought about by the inquiries and the requests of our customers to do so. We finally gave in."

The facts are remarkably clear. Appellant's former employee, Kerr, and former supplier, Hinz, and former salesman, Patterson, put their knowledge and ideas together, and joined forces with the Justers.

The consequence of this association of individuals and ideas was first the marketing of a group of unnamed miniature dolls. The appellant contends that the evidence indicates beyond doubt that this was an experimental gesture to test out whether or not the appellant would complain about the sale of a group of miniature dolls purporting to be representations of fictional characters. Naturally, there was no objection and then the appellees appropriated the well-known and well established trade-marks of the appellant. Speaking candidly, it would be an insult to our intelligence to accept the view that these trade-marks were adopted by the appellees simply as name designations for particular dolls, when it was known to the parties concerned that these particular trade-marks of the appellant enjoyed the most popularity in the trade. The fact that the appellees picked such arbitrary marks as SUGAR AND SPICE and FAIRY-LAND and such an unusual mark as LITTLE MISS DONNETT indicates beyond doubt that the appellees were not concerned merely with the problem of choosing suitable name designations, but that the appellees proceeded without compunction to seek to utilize the valued trade-marks of the appellant, and the trial court was plainly in error in failing to understand that the pattern of unfair competition established by the record in this case is too plain to deny.

THE TRADE-MARKS OF THE APPELLANT ARE
VALID AND INFRINGED.

In reply to the arguments made on behalf of the appellees, it is to be noted from the judgment that the trial Court held that the trade-marks "FAIRY-LAND" and "SUGAR AND SPICE" are valid and infringed, but it is something of a paradox that he reached the opposite conclusion with respect to the trade-marks "RED RIDING HOOD", "LITTLE MISS MUFFET", "MISTRESS MARY", "LITTLE MISS DONNETT", "CURLY LOCKS", "GOLDILOCKS", "JUNE GIRL", "STORY-BOOK" and "STORY". As pointed out, the appellees have sought to appropriate the valued trade-marks of the appellant without compunction, and this includes a term as unusual as "LITTLE MISS DONNETT", which is so unfamiliar as to be practically unknown. The use of this trade-mark by the appellees is simply another striking indication of their intent to appropriate the well known trade-marks of the appellant for a wrongful purpose.

The trade-mark "DOLLS WITH A STORY" is plainly and unquestionably an infringement of the trade-marks "STORYBOOK" and "STORY".

The appellees have made extensive use of the trade-mark "JUNE GIRL", which obviously does not describe any particular type of doll. The appellees appropriated the combination "JUNE BRIDE", and it is clear that under the weight of authority the terms should be considered confusingly similar, since

both notations have a similar meaning, regardless of how the dolls might be dressed.

Although the trial Court failed to appreciate its significance, the strongest possible testimony in behalf of the appellant was given by the witness Juster, the manager and secretary-treasurer of the appellee, Dollcraft Company (Rec. pp. 249-251), when he testified definitely that the trade-marks did not serve to identify particular dolls:

“Q. Do you know how the names were made known to the people who ordered the dolls?

A. I go on the assumption that they recognized the name from the way the doll was dressed.

Q. You feel that the appearance of the doll was sufficient to enable the person making the order to identify the doll by its name?

A. Yes.

Q. I will ask you to examine a specimen of doll which was identified in connection with the deposition of Mr. Rowland taken Wednesday, December 14, 1949, and identified therein as Exhibit 6, and ask you if looking at the doll but without examining the label which appears upon its wrist, you can tell me what character that doll represents?

A. I couldn't tell you.

Q. I will direct your attention to a second doll which was identified in connection with Mr. Rowland's deposition on December 14, 1949, as Exhibit 8 for identification, and ask you if you look at that doll without examining the wrist label on the doll, you can tell what character that represents?

A. I can't identify that one either.

Q. I will direct your attention to another doll produced in connection with Mr. Rowland's deposition designated and identified therein as Exhibit 14, and ask you if you can determine from the appearance of that doll what character it represents or depicts?

A. I can't tell you that one either.

Q. I will further direct your attention to a doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 4, and ask if you can tell from the appearance of that doll what character it represents?

A. No, I can't tell you that one either.

Q. I direct your attention to another doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 4, and ask if you can tell from the appearance of that doll what character it represents?

A. No, I can't tell you that one either.

Q. I direct your attention now to a doll produced in connection with Mr. Rowland's deposition identified therein as Exhibit 12, and I ask you if you can tell from the appearance of that doll what character it represents?

A. I can't tell you that one either.

Q. Directing your attention now to a doll produced in connection with Mr. Rowland's deposition and identified therein as Exhibit 16, I will ask you if you can tell from the appearance of that doll what character it represents?

A. I can't tell you that either.

Q. I will direct your attention to another doll produced in connection with Mr. Rowland's depo-

sition and identified therein as Exhibit 2, and ask you if you can identify what character that doll represents?

A. That one I can recognize. That is possibly 'Red Riding Hood'; I think it is."

The appellees have argued that the trade-marks of the appellant are descriptive in character, and that fictional names of this kind cannot function as trade-marks. It may well be said that as to the questions of validity of trade-marks and infringement, the entire case of the appellees is based on this proposition. The trial Court disregarded the above testimony and erred in the Judgment and Findings by accepting the view expressed by the appellees. It is submitted that the above testimony by Maurice Juster, the doll maker, completely shatters the arguments made by the appellees.

The testimony set forth above relates to dolls sold under the trade-marks "MISTRESS MARY", "CURLY LOCKS", "LITTLE BO-PEEP", "SUGAR AND SPICE", "JUNE GIRL", "GOLDILOCKS", and "LITTLE MISS DONNETT", and finally, "LITTLE RED RIDING HOOD". The entire case of the appellees is based upon the fact that these marks are not valid, and the trial Court erroneously accepted the idea, because each mark identifies a particular doll, but this is utterly fallacious, as demonstrated by the testimony of Juster. Here we have a person with experience in the business, and not a child or an ordinary purchaser, and

this witness failed completely in an effort to identify the various dolls. Of course, he ventured a guess that the doll with the red cape might be identified by the mark "LITTLE RED RIDING HOOD". It is perfectly clear that the primary signification of these various terms has absolutely nothing whatsoever to do with dolls, since they are only the names of characters in rhymes and verses, and tales for children. It is obvious that any and all of these names could serve as perfectly good trade-marks for all sorts of products. Such trade-marks would be regarded at a glance as being fanciful and non-descriptive if used in connection with clothing or furniture or foods. The testimony of Juster indicates beyond doubt that the particular trade-marks of the appellant are not descriptive of particular dolls.

Much of the confusion in this case has arisen as a result of a loose and erroneous use of the word "descriptive", and the appellees have leaned heavily on testimony of the witness Rowland (pages 21 to 26 of appellee's brief), but a careful analysis of this testimony establishes without question that the witness was not using the word "descriptive" in a trade-mark sense, but was seeking earnestly to explain that the various marks of the appellant were to be considered as designations of particular dolls in the large line of dolls which appellant sold under these marks, but this does not mean that the marks would be descriptive in a trade-mark sense. In other words, the witness was seeking to explain that the various marks

were adopted as apt and appropriate designations for particular dolls. The testimony of the witness Juster establishes clearly that the dolls could not be identified, even by one in the doll business, by any particular descriptive names.

The appellant is not concerned with the right to make and sell dolls in various shapes or sizes, and is not seeking to control in any way the manner of dress, but was the first in the field with a series of distinctive marks for miniature dressed dolls, all of which were registered as technical trade-marks under the statutes of the United States, and the trial Court was in error in holding the marks to be invalid and in ordering the cancellation of the registrations of the appellant. Aside from the fact that these trade-marks were all registered without question as fanciful marks, and aside from the fact that the trial Court declined to give any weight to a presumption of validity, the appellant finds strong support for the contention that these trade-marks are inherently fanciful. Surely the problem in this case is akin to that presented to the United States Supreme Court involving a consideration of the trade-marks "THE AMERICAN GIRL" and "THE AMERICAN LADY" used in connection with shoes.

In *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. Rep. 413, C.C.A. 363 (C.C.A. 8th Cir.), the Court, speaking through Judge Munger, stated:

"It is plainly obvious, we think, that the words 'THE AMERICAN GIRL' and 'THE AMERI-

CAN LADY' are so similar as to cause confusion."

On appeal, the United States Supreme Court, in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 60 L. Ed. 629, 36 S. Ct. 269, held that the mark "THE AMERICAN GIRL" is not geographical or descriptive as employed in connection with shoes. The Court pointed out that the term does not signify that the shoes are manufactured in America, or intended to be sold or used in America, and does not indicate the quality or characteristics of the shoes. Furthermore, the Court concluded that the term, in its primary signification, does not indicate shoes at all, but is a fanciful designation. This is true with respect to each and every one of the marks of the appellant, since the terms, in their primary signification do not indicate dolls at all.

In connection with the term "THE AMERICAN GIRL", the Court commented as follows:

"The cases cited to the contrary are distinguishable. In *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 324, 20 L. Ed. 581, 583, the word 'LACKAWANNA' was rejected as a trademark for coal because it designated the district in which the coal was produced. In *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 466, 37 L. Ed. 1144, 1147, 14 Sup. Ct. Rep. 151, it was held that 'COLUMBIA' could not be appropriated for exclusive use as a trademark because it was a geographical name. So, with respect to 'ELGIN' as designating watches (*Elgin Nat. Watch Co. v.*

Illinois Watch Case Co., 179 U. S. 665, 673, 45 L. Ed. 365, 378, 21 Sup. Ct. Rep. 270); 'GENESEE', claimed as a trademark for salt (Genesee Salt Co. v. Burnap, 20 C.C.A. 27, 43 U.S. App. 243, 73 Fed. 818); 'OLD COUNTRY', as a mark for soap (Allen B. Wrisley Co. v. Iowa Soap Co., 59 C.C.A. 54, 122 Fed. 796). If the mark here in controversy were 'AMERICAN SHOES', these cases would be quite in point. (And see Shaver v. Heller & M. Co., 65 L.R.A. 878, 48 C.C.A. 48, 108 Fed. 821, 826). But 'THE AMERICAN GIRL' would be as descriptive of almost any article of manufacture as of shoes; that is to say, not descriptive at all. The phrase is quite analogous to 'AMERICAN EXPRESS', held to be properly the subject of exclusive appropriation as a trademark for sealing wax in Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651, 653."

Obviously, it is often difficult to determine when a certain mark is descriptive as applied to particular goods, or is merely suggestive in character, or arbitrary in character, and there is impressive authority for the proposition that a mark may seem to be descriptive in one sense, and yet function as a perfectly good trade-mark. For example, we note that in *Social Register Association v. Howard*, 60 F. 270 (U.S. C.C.N.J., 1894), the Court held that the term "SOCIAL REGISTER" for a particular type of publication constituted a valid trade-mark. Again, in *New York Herald Co. v. Star Co.*, 146 F. 204 (U.S.C.C. N.Y., 1906), the Court held that the name "BUSTER BROWN" should be fully protected as a trade-mark

for a comic section in a newspaper. In *Selchow v. Baker*, 93 N.Y. 53 (Ct. App. N.Y., 1883), it was held that the term "SLICED ANIMALS" as applied to a game consisting of pictures of animals cut into strips, was not a descriptive trade-mark for such goods. Furthermore, in *Ludington Novelty Co. v. Leonard, et al.*, 127 F. 155 (U.S.C.C.A. 2d Cir., 1903), it was held that the word "CARROMS" is a valid trade-mark when used as the name of a game played with disks on a board.

It is fundamental that in a great many instances a single mark may be applied to one particular product and this fact, standing alone, will not affect the validity of a trade-mark. In *W. F. Burns Co. v. Automatic Recording Safe Co.*, 241 F. 472 (U.S.C. C.A. 7th Cir., 1916), it was held that the word "TELLER" is merely suggestive and not descriptive as a trade-mark for portable coin bank safes. In *John Rissman & Son v. Gordon & Ferguson, Inc.*, 78 F.S. 195 (D.C. Minn., 1948), the Court held that the term "WINDBREAKER" is a valid trade-mark for jackets of a particular type. In *Keebler Weyl Baking Co. v. J. S. Ivins' Son, Inc.*, 24 T. M. Rep. 161 (U.S.D.C. Pa., 1934), the Court held that the term "CLUB CRACKERS" is not a descriptive mark for soda crackers. With respect to the names of individuals, fanciful or otherwise, it may be noted that in *Jacob Ruppert v. Knickerbocker Food Specialty Co.*, 295 F. 381 (U.S.D.C.N.Y., 1923), the Court held that the name "KNICKERBOCKER" with the picture

of Father Knickerbocker is subject to exclusive appropriation as a trade-mark for beer, regardless of the common use of these features. In the early case of *Barrows v. Knight*, 6 R.I. 434, Cox. 238 (Sup. Ct. R.I., 1860), the Court held that the name "ROGER WILLIAMS", although having a well-known historical significance, should be considered as a fanciful trade-mark for cotton cloth, and protected accordingly.

**DISTRICT COURT ERRED IN CONSIDERING STORYBOOK AND
STORY AS GENERIC NAMES FOR DOLLS.**

It is clear from the record that the trade-mark "STORYBOOK" is of particular importance to the appellant because this trade-mark is used extensively for the full line of products. This trade-mark does not in any way describe dolls. If the term "STORYBOOK" is descriptive of anything at all, it would be descriptive of books. The term is clearly fanciful when used in connection with dolls and this is equally true with respect to "STORY". The trial Court failed to understand (Finding of Fact 18) that these terms do not identify or refer solely to books for children or little girls, for according to the dictionary a story is simply a connected narration and therefore the term "STORYBOOK" and the word "STORY" have a broad meaning and no connection whatsoever with dolls. The important point in this proceeding is that "STORYBOOK" and "STORY" are valid trade-marks for dolls.

The appellant believes that the statement of the Supreme Court in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, supra, regarding the expression "AMERICAN GIRL" for shoes may well be considered controlling, and the Court reasoned as follows:

"Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate shoes of their manufacture. We are convinced that it was subject to appropriation for that purpose, and it abundantly appears to have been appropriated and used by complainant and those under whom it claims."

Reference is made in the brief of the appellees to the decisions in *Jell-Well Dessert Co. v. Jell-X-Cell Co., Inc.*, 22 Fed. (2d) 522, 9 C.C.A., in which "JELL-WELL" was held to be descriptive for a gelatin dessert, to *Standard Paint Company v. Trinidad Asphalt Manufacturing Company*, 31 S. Ct. 456, 220 U.S. 446, in which "RUBEROID" was held to be descriptive for roofing paper, and to *National Nu Grape Co. v. Guest*, 164 Fed. (2d) 874, in which "NuGRAPE" was held to be descriptive for a grape drink, and also to *Wilhartz v. Turco Products, Inc.*, 164 Fed. (2d) 731, in which "AUTO SHAMPOO" was held to be descriptive for an auto wash. It is submitted that our present case is clearly distinguishable from these decisions. It is obvious that "RUBEROID" and "AUTO SHAMPOO" are merely the names of the products and nothing more. It is plain also that "JELL-WELL" and "NuGRAPE" are or-

dinary descriptive terms for the particular products mentioned. Reference is made also in the brief of the appellees to *Van Camp Sea Food Co. v. Cohn-Hopkins et al.*, 56 F. (2d) 797, and *Van Camp Sea Food Co., Inc. v. Westgate Sea Products Co.*, 28 F. (2d) 957, involving the mark "CHICKEN OF THE SEA" for tunafish. It is clear that the word "Chicken" was regarded as the equivalent of "tender fish", and that "of the sea" was regarded as a term descriptive of any fish, hence the term "CHICKEN OF THE SEA" was deemed to be simply the equivalent of "Tender Fish of the Sea". However, the trade-marks of the appellant are in an entirely different category, because the primary meaning of these terms has nothing whatever to do with dolls. All of the trade-marks under consideration relate to terms associated with fiction and legend. Actually, these marks should be regarded as highly fanciful when used in a commercial sense in connection with manufactured products.

SECONDARY MEANING.

Although the appellant believes that the trade-marks under consideration are fanciful and have identified the products of the appellants for many years, some thought has been given to the matter of secondary meaning. Reference is made in the brief of the appellees to *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 59 S. Ct. 109, 113, in which it was held that "SHREDDED WHEAT" is primarily the

name of a product, and to *Skinner Mfg. Co. v. Kellogg Sales Co.*, 143 Fed. (2d) 895, in which it was held that "RAISIN-BRAN" is descriptive of a raisin bran breakfast food. Here again the present case is distinguishable, since "SHREDDED WHEAT" and "RAISIN-BRAN" are simply the names of the products.

Reference is made also to *Durable Toy & Novelty Corporation v. J. Chein & Co., Inc., et al.*, 133 F. (2d) 853, 855, in which it was held that "UNCLE SAM" and the figure of Uncle Sam could not be appropriated. It is an obvious fact, and was recognized by the Court, that "UNCLE SAM" means the same thing as "United States", and is, to all intents and purposes, a national insignia, which should not be appropriated exclusively by one person. It is plain enough that "UNCLE TOM" and the representation of the fictional character would be a perfectly good trade-mark for toy banks or any other products.

The record in this case shows a large volume of business and extensive use of the trade-marks by the appellant to the extent of some ten million dollars (Rec. pp. 304, 317, 318) and there is no evidence of any unquestioned adverse use of the marks by others in connection with miniature dolls. Naturally, secondary meaning may be inferred from the facts. The Court is well aware that numerous witnesses could be brought into Court to testify that a trade-mark has acquired a secondary meaning, and that a like number of witnesses could be brought into Court to deny that

a mark had acquired a secondary meaning. It follows, therefore, that when a series of trade-marks have been used exclusively and extensively over a period of years in connection with particular products, it would be entirely reasonable to accept the view that these marks had acquired a secondary meaning in the trade.

In discussing the subject of secondary meaning, it has been said that this is a new meaning attaching to the word or words, which has been created by trade-mark use, and this new meaning does not belong to the public, but to the party responsible for its creation. The basis for relief is found in the injury to the good-will of the party by the loss of those customers who, seeing the word or words on the goods of another, buy such goods instead of the goods of the party who established the new or secondary meaning. The important question to consider is what purchasers understand by the use of the word or words. In the leading case of *Barton v. Rex-Oil Co.*, 2 F. (2d) 402, 404 (C.C.A. 3, 1924), 40 A.L.R. 424 (Wooley, J.), 29 F. (2d) 474 (C.C.A. 3, 1928), the Court concluded that the mark "DYANSHINE" had acquired a secondary meaning for the purpose in connection with which it was used, but it was recognized that there should be a free, normal and ordinary use of the words "Dye and Shine" for descriptive purposes, but not in a trade-mark sense. If such word or words, when used as a trade-mark, indicate the origin of the goods, the owner should be protected,

regardless of whether or not the public may properly use the words in their primary narrative descriptive meaning in properly describing particular products.

The question of determining whether or not the trade-mark has acquired a secondary meaning is oftentimes a difficult one to answer. In this connection it is deemed helpful to consider the remarks of *Nims* in his treatise on *Unfair Competition and Trade-Marks* (Vol. 1, page 166, 4th Ed.), wherein he writes as follows:

“The terms ‘descriptive’ and ‘generic’ have been used interchangeably with reference to trade marks. They are distinguishable. A generic name gives information as to the nature or class of article. A descriptive word supplies the characteristics of the article, its color, order, dimensions, functions, possibly its ingredients. Judge Lindley, in the Seventh Circuit Court of Appeals, said that descriptive words are ‘included within the broader category of generic terms’, and then held that the term ‘Hot Patches’ as used on vulcanizing units and apparatus for repairing rubber parts had acquired a secondary meaning. (*Speaker v. Shaler*, 87 F. (2d) 985, 987 (CCA 7, 1937), 33 PQ 310.)

An example of a generic name which was held to have a secondary meaning but which the court referred to as a descriptive word is ‘Nervine’, meaning a nerve tonic or remedy for disorders of the nerves, manufactured by Richmond Remedies Company. (*Richmond Remedies Co. v. Dr. Miles Medical Co.*, 16 F. (2d) 598, 603 (CCA 8, 1926).) An example of a descriptive word on the

other hand, is 'Dumore' used for a washing machine. This also was protected as a trade name having a secondary meaning. (*Wisconsin Electric Co. v. Dumore Co.*, 35 F. (2d) 555, 557 (CCA 6, 1929), 3 PQ 232.)

This distinction between generic and descriptive words may be of some significance in determining the nature of the remedy which may be granted when a generic or descriptive word having a secondary meaning is infringed. It does not affect the general rule. The question is not the nature of a word in the public domain, but whether when it is used on goods of a particular kind the word is recognized as indicating the source of such goods. In holding that Coca-Cola is entitled to protection as a trade-mark, Justice Holmes said: 'Whatever may have been its original significance, the mark for years has acquired a secondary significance and has indicated that plaintiff's product alone.' (*Coca-Cola Co. v. Koke Co.*, 254 US 143, 145 (1920), 65 L. Ed. 189, 41 SC 113.)"

In this case the record establishes convincingly that the trade-marks of the appellant identify in the trade the miniature dolls manufactured and sold by the appellant.

CONCLUSION.

It is respectfully submitted that the appellees have competed unfairly with the appellant, that the trade-marks of the appellant are valid, that the registra-

tions are valid and subsisting, and that these registered trade-marks have been infringed by appellees. It is respectfully urged that the judgment of the District Court should be reversed, except with respect to "FAIRYLAND" and "SUGAR AND SPICE", with an award of costs to the appellant.

Dated, San Francisco, California,
February 27, 1952.

Respectfully submitted,
WILLIAM G. MACKAY,
Attorney for Appellant.

See vol. 2684
United States

Court of Appeals

for the Ninth Circuit

AMERICAN CRYSTAL SUGAR COMPANY, a
corporation,

Appellant,

vs.

MANDEVILLE ISLAND FARMS, INC., a cor-
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EVANS,

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Transcript of Record

In Two Volumes

Volume I
(Pages 1 to 400)

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* Page numbering appearing at foot of page of original Certified Transcript of Record.

In the District Court of the United States for the
Southern District of California, Central Division

No. 4643-BH

MANDEVILLE ISLAND FARMS, INC., a corpo-
ration, and ROSCOE C. ZUCKERMAN,

Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a
corporation,

Defendant.

ACTION FOR AN ACCOUNTING, DAMAGES
UNDER THE ANTI-TRUST LAWS, ETC.

Now comes plaintiffs above named and as a first
count herein alleges:

I.

The grounds upon which the jurisdiction of the
court depends are: (a) Diversity of citizenship; (b)
this is an action brought by persons injured in
their business and property by reason of acts of the
defendant forbidden in the anti-trust laws of the
United States, (15 U.S.C. §15) and brought in a
district in which the defendant is found and has
an agent.

II.

(a) Plaintiff Mandeville Island Farms, Inc., now
is and at all times herein mentioned has become a
corporation duly organized and existing under and
by virtue of the laws of and a citizen and inhabitant

of the State of California, with its principal place of [2] business in Stockton, San Joaquin County, California.

(b) Defendant American Crystal Sugar Company now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent designated for service of process under and by virtue of the law of the State of California regarding foreign corporations, is, J. W. Rooney of Oxnard, Ventura County, in the above entitled district and division of California.

(c) Plaintiff Roscoe C. Zuckerman now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

III.

Plaintiffs Mandeville Island Farms, Inc. and Roscoe C. Zuckerman assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common

questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown and grown on Mandeville Island which is a tract of land located in California north of the 36th parallel. A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31 of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences. [3]

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in California north of the 36th parallel were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long

distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and [4] controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers. The sugar manufactured from said beets was, during all of said period, sold in interstate commerce throughout the United States.

VI.

During said period above referred to, the only method of sale of marketable sugar beets used by growers of sugar beets in said area was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers.

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturer. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to sell the raw sugar so produced not later than August 31 of the next crop year, (d) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold [5] and

to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (e) to make final settlement for all beets after the sugar manufactured from said beets had been sold in interstate commerce, but on or before August 31st of the next crop year, the price to be paid for said beets to be determined upon the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and were used in the Sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agriculture in accordance with §301 of the said Sugar Act. (7 U.S.C. 1131). Claude R. Wickard was at all times mentioned in this paragraph the duly appointed qualified and acting Secretary of Agriculture. On Dec. 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to §301d of said Sugar Act (7 U.S.C. 1131 (d)) made the following determination of the fair and reasonable price

for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231).

“Fair and reasonable prices for the 1940 and 1941 crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule: [6]

Percentum sucrose in beets.	Average net return per 100 lbs. of sugar				
	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00
	Price per ton of sugar beets				
19.....	\$7.12	\$6.65	\$6.18	\$5.70	\$5.22
18.....	6.66	6.21	5.76	5.31	4.86
17.....	6.20	5.78	5.36	4.93	4.50
16.....	5.76	5.36	4.96	4.56	4.16
15.....	5.32	4.95	4.58	4.20	3.82
14.....	4.90	4.55	4.20	3.85	3.50

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content, higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however, That in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, That a haulage allowance at a rate not less than 2½ cents per mile per ton shall be granted to growers who perform such service in areas in which allowances have been agreed upon between producer-processors and growers.”

No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or withdrawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California Crops are as set forth in said determination.

IX.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. [7] But during the crop seasons of 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar.

X.

During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash

discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .263 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel received on the average from $291\frac{1}{2}$ cents to $521\frac{1}{2}$ cents per ton more for sugar beets delivered to defendant corporation than did growers of identical beets of identical sugar content delivered to other manufacturers of beet sugar in California north of the 36th parallel.

XI.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States, and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as to the price to be paid the growers for

sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organizations of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the grower of sugar beets a reasonable price for their beets, each bought beets only from growers who signed a standard printed form contract prepared by the said manufacturers and identical in all material terms. Growers either sold under said contract to one of said manufacturers

or could not sell their marketable [9] beets to anyone except for hog or cattle feed at a large loss.

(e) Said standard contract for the crop years 1939, 1940, and 1941 provided that the price to be paid the grower of sugar beets in dollars and cents for beets containing 15, 16, 18 and 19 per cent sugar (the percentages here involved) was as follows:

Net return received from sugar per cwt.	Amount to be paid to grower per ton of beets			
	19%	18%	16%	15%
5 cents.....	8.74	8.28	7.28	6.72
4¾ cents.....	8.33	7.89	6.94	6.41
4½ cents.....	7.92	7.51	6.60	6.09
4¼ cents.....	7.35	6.97	6.12	5.65
4 cents.....	6.78	6.42	5.64	5.21
3¾ cents.....	6.21	5.88	5.17	4.77
3½ cents.....	5.72	5.42	4.76	4.40
3¼ cents.....	5.31	5.03	4.42	4.08
3 cents.....			3.77*	3.49*

* For the year 1940 only.

Said standard contract gave a schedule of net returns from sugar per 100 lbs. in one-fourth cent intervals and showed the percentage of sugar content in one per cent intervals, including those above set forth, but the contract further provided that intermediate figures of net return from sugar 100 lbs. and intermediate percentages of sugar content were to be figured pro rata. Inasmuch as beets of sugar content other than 15, 16, 18 and 19 per cent are not herein involved, the schedules herein are limited to such percentages. Said prices agreed upon by defendant and its co-conspirators to be paid by them

and paid by them to plaintiff and the other growers of sugar beets in California north of the 36th parallel were not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in par. VIII hereof.

VII.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. But during said crop seasons of 1939, 1940 and 1941, as a direct, expected and planned result of said conspiracy, there was no longer any such competition. Plaintiffs are informed and believe and, upon such information and belief, allege that defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said con-

spiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XIII.

As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and [11] the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring.

XIV.

Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31,

1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method agreed upon in said conspiracy as above set forth.

XV.

The determination of the Secretary of Agriculture under the Sugar Act of 1937 as to the fair and reasonable prices for the 1940 and 1941 California crops of sugar beets was made Dec. 21, 1940 and was published on the Federal Register on Dec. 24, 1940 as aforesaid, but, nevertheless, defendant and its said co-conspirators, each of whom took part in the said hearings held by the Secretary of Agriculture, and each of whom well knew of the determination, persisted thereafter in their said conspiracy and would not buy beets from growers in California north of the 36th parallel except under the terms and conditions set forth in said standard agreement.

XVI.

On November 14, 1938, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part

to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25% from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVII.

On December 29, 1939, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on August 31, 1941, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 tons of sugar beets of an average sugar content of 15.55% from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar. Said plaintiff does not know when said beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. [13] Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVIII.

On June 23, 1941, defendant and plaintiff Roscoe C. Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay said plaintiff on August 31, 1942, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47% from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XIX.

Defendant paid plaintiffs for their 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiffs on said respective dates, not upon the price secured in interstate commerce from sugar beets delivered by plaintiffs and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel, as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases deter-

mined by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce by all manufacturers of beet sugar with refineries in California north of the 36th parallel and in accordance with the schedule set forth in the said standard contracts. Plaintiffs are informed and believe [14] and, upon such information and belief allege that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiffs for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XX.

By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid.

XXI.

Plaintiffs, in order to enforce their rights against defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), are entitled to reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys. [15]

XXII.

From October 10, 1942, to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942 (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1944 Cum. An. P. P. Title 15, Sec. 16, p. 76), which was in full force and effect between October 10, 1942 and June 30, 1945.

And As a Second Count, plaintiff Mandeville Island Farms, Inc., alleges:

XXIII.

The ground upon which the jurisdiction of the court depends is diversity of citizenship.

XXIV.

Plaintiff refers to Pars. II, III, IV, V, VI, VII, VIII, IX, X, and subpar. e of Par. XI hereof and incorporates the same herein by reference as though here set forth in full.

XXV.

Plaintiff refers to Par. XVII hereof and incorporates the same herein by reference as though here set forth in full.

XXVI.

Commencing the latter part of December, 1940, and continuing until March, 1941, the price of raw sugar increased in value by the amount of approximately 75c per 100 lbs. and remained at said higher prices or even still higher prices for many months thereafter. Said plaintiff Mandeville Island Farms, Inc. is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar at the higher prices that prevailed subsequent to April 1, 1941, retained most of it and sold it subsequent to August 31, 1941, at the high prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided[16] for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets

produced by plaintiff and other growers during the crop season of 1940 and delivered during said crop season under said standard form of contract but used the prices obtained for sugar sold from August 1, 1940 to August 31, 1941, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1940 and which was grown and delivered in previous crop seasons and which was sold by said defendant and the other manufacturers at the lower prices that prevailed from August 1, 1940 to December 31, 1940, instead of at the higher prices that prevailed when the 1940 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, and the other manufacturers, well knowing that the price of sugar would rise prior to January 1, 1941, made various sales prior thereto after it and they had such knowledge to various purchasers so that the purchasers would reap the profits resulting from the increased price which defendant and said other corporations knew was about to occur, at the expense, detriment and loss of said plaintiff and other growers under like contracts.

XXII.

Defendant has paid to said plaintiff the sum of \$102,767.13 for 25,430.3 tons of sugar beets of 15.55% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1940 season. Said payment, however, was, as aforesaid, based not

upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1940 crop season, but upon the sales made during the 1940 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and believes and, upon such information and belief, alleges that said [17] sales were composed mainly of sugar manufactured previous to the 1940 season from beets not produced or delivered during the 1940 season.

XXIV.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1940 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from beets delivered during the 1940 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXV.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the

1940 crop at the best price obtainable but sacrificed the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant.

XXVI.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1940, charged as expenses various improper amounts which should not have been [18] charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff.

Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon said information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XXVII.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid by plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$102,767.13 paid to plaintiff as aforesaid, was based upon 25,430.3 tons of beets of an average sugar content of 15.55% and upon an alleged net return per 100 lbs. of sugar of \$3.160. In arriving at said sum of \$102,767.13, defendant erroneously and contrary to said agreement took an intermediate sugar price of \$4.04. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.160 was correct) would be \$4.04272 instead of \$4.04. As a result, defendant underpaid said plaintiff \$.00272 per ton, or a total of \$69.27, assuming that the net return per 100 lbs. of sugar was \$3.160.

(b) Furthermore defendant calculated the amount to be paid said plaintiff Mandeville Island Farms, Inc. for the 1940 crop upon the said schedule set forth in the standard contract and not upon the said

schedules set forth in the said determination of the Secretary of Agriculture. Beets of a sugar content of 15.55%, made into sugar which returned an average of \$3.160 per 100 lbs. to the manufacturer would pay the grower \$4.255 a ton, under the said determination schedules instead of \$4.04 a ton under the standard contract schedule, a difference of 21 cents a ton or \$5,467.52 on 25,430.3 tons, which sum is due and unpaid to said plaintiff in addition to the other sums herein referred to.

And As a Third Count, plaintiff Roscoe C. Zucker-
man alleges:

XXVIII.

The ground upon which the jurisdiction of the court depends is diversity of citizenship.

XXIX.

Said plaintiff refers in Pars. II, III, IV, V, VI, VII, VIII, IX, X and subpar. e of Par. XI hereof and incorporates the same herein by reference as though here set forth in full.

XXX.

Said plaintiff refers to Par. XVIII hereof and incorporates the same herein by reference as though here set forth in full.

XXXI.

On January 1, 1942, the price of raw sugar increased substantially in price, and during the month of April, 1942, the price of sugar again increased

substantially in price and remained at said higher price for many months thereafter. Said plaintiff is informed and believes and, upon said information and belief, alleges that defendant, instead of selling said sugar on or before August 31, 1942, at the high prices that prevailed from April until August, 1942, sold but little of it and retained most of it and sold it subsequent to [20] August 31, 1942, at the high prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1941 and delivered during said crop season under said contract, but used the prices obtained for sugar sold from August 1, 1941 to August 31, 1942, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1941 and which was grown and delivered in previous crop seasons and which was sold at the lower prices that prevailed from August 1, 1941 to December 31, 1941, instead of at the higher prices that prevailed when the 1941 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant and the other sugar manufacturers, well knowing that the price of sugar would rise on January 1, 1942, made various sales prior thereto after it had such knowledge to various purchasers so that the purchasers would reap the

profits resulting from the increased price which defendant knew was about to occur, at the expense, detriment and loss of said plaintiff and other growers under like contracts.

XXXII.

Defendant has paid to said plaintiff the sum of \$74,794.76 for 14,144.7 tons of sugar beets of 15.47% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1941 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1941 crop season, but upon the sales made during the 1941 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and [21] believes and, upon such information and belief, alleges that said sales were composed mainly of sugar manufactured previous to the 1941 season from beets not produced or delivered during the 1941 season.

XXXIII.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1941 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or means other than by an accounting suit to secure such

information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from beets delivered during the 1941 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXXIV.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1941 crop at the best price obtainable but sacrificed the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant.

XXXV.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1941, charged [22] as expenses various improper amounts which should not have been charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XXXVI.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$74,794.76 paid to plaintiff as aforesaid, was based upon 14,144.7 tons of beets of an average sugar content of 15.47% and upon an alleged net return per 100 lbs. of sugar of \$3.950. In arriving at said sum of \$74,794.76, defendant erroneously and contrary to said agreement

took an intermediate sugar price of \$5.29. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.950 was correct) would be \$5.32128 instead of \$5.29. As a result, defendant underpaid said plaintiff \$.03128 per ton, or a total of \$442.45, assuming that the net return per 100 lbs. of sugar was \$3.950.

(b) Furthermore, defendant calculated the amount to be paid said plaintiff Roscoe Zuckerman for the 1941 crop upon the said schedules set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of sugar content of 15.47% made into sugar which returned on an average \$3.950 per 100 lbs. to the manufacturer would pay the grower \$5.46048 a ton under the said determination schedule instead of \$5.29 as paid by defendant to plaintiff, a difference of \$.17048 a ton or \$2,411.39 on 14,144.7 tons, which sum is due and unpaid to said plaintiff in addition to the other sums referred to herein.

Wherefore, plaintiffs pray judgment against defendant as follows:

1. That defendant be required to account to plaintiffs in connection with all sugar beets delivered by plaintiffs to defendant during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.

2. That plaintiff Mandeville Island Farms, Inc. have judgment for the sum found to be due it by said accounting and that the amount so found due be trebled.

3. That plaintiff Roscoe C. Zuckerman have judgment for the sum found to be due him by said accounting and that the amount so found due be trebled.

4. That plaintiff Mandeville Island Farms, Inc. have judgment against the defendant for \$345,043.80 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

5. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for \$112,192.14 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

6. That plaintiff Mandeville Island Farms, Inc. have judgment against the defendant for the sum of \$50,536.79 upon the second count, [24] together with interest thereon from August 31, 1941.

7. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for the sum of \$47,853.64 upon the third count, together with interest thereon from August 31, 1942.

8. That plaintiffs have judgment for their costs herein involved and attorney fees.

9. That plaintiffs have such other and further relief as may be fit and proper in the premises.

/s/ WOOD, CRUMP, ROGERS and
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

Acknowledgment of service.

[Endorsed]: Filed July 30, 1945. [25]

[Title of District Court and Cause No. 4643.]

NOTICE OF MOTION TO DISMISS OR IN
THE ALTERNATIVE TO STRIKE FROM
COMPLAINT OR FOR A MORE DEFINITE
STATEMENT OR FOR A BILL OF PAR-
TICULARS

To Plaintiffs in the Above Entitled Action and to
Messrs. Wood, Crump, Rogers and Arndt, Their
Attorneys:

Please Take Notice that defendant above named
will, on Monday, October 1, 1945, at the hour of
10:00 o'clock a.m., or as soon thereafter as counsel
may be heard, move the above entitled court, in
Court Room No. 6 thereof, in the United States Court
House and Post Office Building, Los Angeles, the
Honorable Ben Harrison, Judge Presiding, as fol-
lows:

1. To dismiss the action because the complaint
fails [26] to state a claim against defendant upon
which relief can be granted.

2. To dismiss the first count attempted to be set
forth in said complaint because the same fails to
state a claim against defendant upon which relief
can be granted.

3. To dismiss said first count because the same
fails to state a claim against defendant upon which
relief can be granted under the anti-trust laws of
the United States, or any thereof.

4. To dismiss said first count because the same is

barred by the provisions of Section 359 of the Code of Civil Procedure of California.

5. To dismiss the second count attempted to be set forth in said complaint because the same fails to state a claim against defendant upon which relief can be granted.

6. To dismiss the third count attempted to be set forth in said complaint because the same fails to state a claim against defendant upon which relief can be granted.

7. In the alternative, and in the event the above motion to dismiss are for any reason denied, to strike from the complaint, because immaterial, the following parts or portions thereof:

(a) The whole of paragraph numbered VIII, pages 5, 6.

(b) The whole of paragraph number X, page 7.

(c) That part of paragraph numbered XI appearing on page 10 thereof and reading as follows:

“The reasonable price for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph VIII hereof.”

(d) The whole of paragraph numbered XV, pages 11, 12.

(e) The whole of subparagraph b of paragraph numbered XXVII, appearing on page 19 thereof.

(f) The whole of subparagraph b of paragraph numbered XXXVI, appearing on page 23 thereof.

8. In the alternative, and in the event the above motions to dismiss are for any reason denied, for a more definite statement or for a bill of particulars to enable defendant properly to prepare its responsive pleading and to prepare for trial. The defects complained of and the details desired are as follows:

(a) The failure to specify the facts, if any, warranting the conclusion of the pleader expressed in paragraph numbered VII on pages 7-8 that the purpose of the alleged conspiracy referred to in said paragraph was "to unlawfully monopolize and restrain commerce in sugar and sugar beets among the several states" or "to unlawfully fix prices to be paid the growers of sugar beets" or that the activities complained of were "all in violation of the anti-trust laws of the United States."

(b) The failure to specify the facts, if any, warranting the conclusion of the pleader expressed in paragraph numbered XIII on pages 10-11, that as "a direct, expected and planned result of said conspiracy, the free and natural flow of commerce [28] in interstate trade was intentionally hindered and obstructed."

(c) The failure to specify how, or in what manner or to what extent, or with reference to what commodity, if any, the free and natural flow of commerce in interstate trade was intentionally or otherwise hindered or obstructed, as alleged.

(d) The failure to specify any facts warranting the inference or finding that the activities com-

plained of in any way restrained or otherwise affected interstate commerce.

(e) The failure to specify any facts warranting the inference or finding that the damages assertedly suffered by plaintiffs or either of them, resulted proximately or at all from any act or acts prohibited by the anti-trust laws of the United States.

Said latter motion will be made upon the ground that none of the foregoing matters are alleged with sufficient definiteness or particularity to enable defendant properly to prepare its responsive pleading or to prepare for trial.

In order to facilitate the presentation, consideration and discussion of the foregoing motions, and inasmuch as defendant does not understand that there is any controversy between the parties as to form or terminology of the standard form contracts referred to in the complaint, there are hereunto annexed, marked respectively Exhibits A, B, and C and made a part hereof, specimens of the same for the crop years 1939, 1940 and 1941.

Dated: September 15, 1945.

O'MELVENY & MYERS,
PIERCE WORKS, JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant. [29]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Motion to Dismiss—Count I

1. The primary question presented is whether or not, assuming for the purposes of the motion the existence of the conspiracy alleged, such conspiracy had the purpose or effect of suppressing or restraining competition in interstate commerce either by monopolizing the supply of an interstate commodity, or controlling its price, or otherwise controlling the market to the detriment of purchasers or consumers of such commodity.

2. A subordinate question is whether or not the damages asserted by plaintiffs resulted naturally and proximately from any act or acts, such as above outlined, prohibited by the anti-trust laws.

A. The Commodities Involved

3. The commodities involved are sugar and sugar beets. Plaintiffs are sugar beet growers; defendant is a purchaser and processor of the beets, from which it manufactures beet sugar. The sugar, after its manufacture, moves in interstate commerce; the sugar beets, it is important to note, do not. They are grown, harvested, delivered to defendant and processed by the defendant into sugar wholly within the boundaries of the State of California.

Complaint, Par. V (a), p. 3. [30]

B. Nature and Alleged Results of the Asserted Conspiracy or Combination

4. Apparently due to the fact that there are no

other beet sugar manufacturers in California north of the 36th parallel (which roughly approximates the northern boundary line of San Luis Obispo, Kern and San Bernardino Counties) it is charged that defendant and two other processors have a monopoly as to the manufacture of sugar in that area. The complaint then charges a conspiracy, assertedly to unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all, it is said, in violation of the anti-trust laws of the United States by agreeing to do and doing the following enumerated overt acts during the crop years 1939, 1940 and 1941:

(1) Ceasing to compete against each other as to the price to be paid the beet growers;

(2) Paying the same price to all beet growers for their beets, determining the price upon the average net returns to the manufacturers from the sugar manufactured by them;

(3) Failing to compete as to the efficiency of their respective sales and manufacturing organizations; whereby, regardless of the price at which sugar was sold, all growers were paid the same price for their beets.

(4) Refusing to buy beets from any grower unless he signed a standard form contract identical in terms with those of the other two manufacturers. (See Exhibits A, B and C hereunto attached.) [31]

(5) Paying all beet growers upon the average net return basis mentioned above in subparagraph (2) instead of upon the reasonable price as determined by the Secretary of Agriculture under the Sugar Act (7 U.S.C. 1131) thereby depriving the growers of the reasonable value of their beets.

Complaint, Pars. V(b) ; XI, pp. 3-4, 7-10.

5. As a result of the asserted conspiracy, it is said that the members thereof failed to compete as to efficiency in their various departments whereby they received less in sales returns and incurred more expense, wherefore plaintiffs did not receive the reasonable value of their beets. It is further said that the free flow of interstate commerce was thereby hindered and obstructed, competition was frustrated and the net effect was as if the three manufacturers were in reality one, without, however, the efficiency that consolidation into one corporation would bring.

Complaint, Par. (numbered) VII, XIII, pp. 10-11.

6. At this point it is material to point out that the gist of the asserted conspiracy relates solely to an asserted fixing of the price of sugar beets, which are bought and sold solely in intra-state commerce. The complaint of these plaintiffs amounts to no more than an assertion that because of this, they were deprived of the reasonable value of their sugar beets. At the same time, it is equally worthy of note that the complaint does not even pretend to allege that

any of the acts assertedly done or omitted to be done by the alleged conspirators in any way affected the free flow in interstate commerce of the sugar manufactured from these beets, either by way of affecting its price, or the available supply thereof in interstate commerce, or otherwise. In this regard particular emphasis should be laid on the allegation in paragraph XI(c) page 8, that regardless of the price at which the sugar was sold, the beet grower received the same price. This is an outright admission that the asserted conspiracy in no way affected the only commodity entering the flow of interstate commerce.

C. Applicable Principles of Law

7. In order to state a cause of action under the anti-trust laws, it is necessary to show that the activities complained of either had or were intended to have a direct effect upon prices of the interstate commodity—here sugar, as distinguished from the sugar beets—or otherwise to deprive purchasers or consumers of the sugar of the advantages which they would derive from free competition; and no such showing has been made.

Apex Hosiery Co. v. Leader, 310 U.S. 469,
500-502.

Chicago Board of Trade v. U. S., 246 U.S.
231, 238.

U. S. v. U. S. Steel Co., 251 U.S. 417.

U. S. v. International Harvester Co., 224 U.S.
693.

Appalachian Coals v. U. S., 288 U.S. 344, 375.

8. The production and manufacture of goods or commodities is not commerce, nor does the fact that the same are intended to be shipped in interstate commerce after their manufacture make them a part thereof. Interstate Commerce begins by the actual delivery of the manufactured commodity—here the sugar—to a carrier for transportation or the actual commencement of its transfer to another state. [33]

Hopkins v. U. S., 171 U.S. 578, 588, 591-592.

United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 407-8, 410-13.

United Leather Workers v. Herkert etc. Trunk Co., 265 U.S. 457, 471.

Industrial Assn. v. U. S., 268 U.S. 64, 82.

Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 107.

Hammer v. Dagenhart, 247 U.S. 251.

D. L. & W. R.R. Co. v. Yurkonis, 238 U.S. 439.

Coe v. Errol, 116 U.S. 517, 525, 528.

Kidd v. Pearson, 128 U.S. 1.

Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245.

McCluskey v. Marysville & N. Ry. Co., 243 U.S. 46.

Arkadelphia Co. v. St. L. S.W. Ry., 249 U.S. 134.

Crescent Oil Co. v. Mississippi, 257 U.S. 129.

9. The foregoing statements apply as fully to sugar as to any other commodity. Interstate commerce does not begin until the sugar is manufactured and shipped; and nothing done or omitted to be

done with reference to the production or manufacture of the sugar may be said to have the direct effect upon commerce condemned by the anti-trust acts.

U. S. v. E. C. Knight Co., 156 U.S. 1, 12, 13, 16-17.

Utah-Idaho Sugar Co. v. Federal Trade Com., 8 Cir. 22 Fed. (2d) 122, 125-6.

U. S. v. Great Western Sugar Co., D.C. Neb., 39 Fed. (2d) 149.

10. That the interference with interstate commerce condemned by the anti-trust laws must be direct and not remote or conjectural, is well settled.

See authorities above; also

McJunkin v. Richfield Oil Co., N.D. Cal., 33 Fed. Supp. 466.

Gable v. Vonnegut Mach. Co., 6 Cir., 274 Fed. 66.

Boro Hall Corp. v. Genl. Motors Corp., D.C. N.Y. 37 Fed. Supp. 999.

11. The requirement that the interference be direct and not remote is especially necessary where, as here, the injury claimed only relates to the plaintiffs' business in its intra-state aspects. An alleged conspiracy which is aimed at restraining a local enterprise and which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of the anti-trust laws.

Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 Fed. (2d) 742, 753-4.

Abonaf v. J. D. & A. B. Spreckels Co., N.D. Cal., 26 Fed. Supp. 830, 833.

Compare:

U. S. v. Patten, 226 U.S. 525.

Field v. Barber Asphalt Paving Co., 194 U.S. 618.

Lynch v. Magnavox Co., Inc., 9 Cir., 94 Fed. (2d) 883.

Lipson v. Socony-Vacuum Corp., 1 Cir., 76 Fed. (2d) 213.

12. Only those damages may be recovered in an anti-trust suit which are the proximate result of a violation of the anti-trust laws. It is not enough to allege something ostensibly forbidden by those laws and claim general damages arising therefrom. [35]

McJunkin v. Richfield Oil Corp., N.D. Cal., 33 Fed. Supp. 466.

Sullivan v. Associated Billposters, D.C. N.Y., 272 Fed. 323.

Westmoreland Asbestor Co. v. Johns-Mansville, 30 Red. Supp. 389.

Gerli v. Silk Assn., D.C. N.Y., 36 Fed. (2d) 959.

Twin Ports Oil Co. v. Pure Oil Co., D.C. Minn. 46 Fed. Supp. 149.

Miller Oil Co. v. Socony-Vacuum Oil Co., 37 Fed. Supp. 831.

13. Defendant is not advised as to whether plaintiffs intend to assert that even though no violations of the anti-trust acts have been shown, the facts al-

leged nevertheless state a claim upon which relief could be granted under the California anti-monopoly statute. (Cartwright Act, Calif. Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; recodified as Business and Professions Code Secs. 16720-16726, 16750-16758.) A somewhat similar situation was considered in the Alabama case of Dothan Oil Mill Co. v. Espy, 127 So. 178, which very closely resembled the present case on the facts. However, there are two sufficient answers to such a contention.

14. Both this Court and the appellate courts of California have held the Cartwright Act unconstitutional in that it provides no fixed standard of guilt, due to the "reasonable profit" exceptions embodied in the amendment of 1909. (See Bus. & Prof. Code, sec. 16723.)

Blake v. Paramount Pictures, (S.D. Cal.) 22
Fed. Supp. 249. [36]

Ward v. Auctioneers' Ass'n, 67 A.C.A. 194.

Compare:

Cline v. Frink Dairy, 274 U.S. 445.

15. In any event, any cause of action under the Cartwright Act for activities during 1939, 1940 or 1941 were barred three years after the creation of any liability thereunder.

California Code of Civil Procedure, Sec. 359.

II. Motion to Dismiss—Counts II and III

16. The questions presented by Counts II and III relate entirely to the construction of the form con-

tracts between the parties, Exhibits A, B and C attached. They are:

(a) Was defendant obligated to pay plaintiffs, for beets purchased by it from plaintiffs during a particular crop year, upon the basis of the sales of sugar manufactured from those particular beets, or upon the basis of sugar sold during such crop year, irrespective of when the beets going to make up such sugar were raised?

(b) Was defendant obligated to sell at "the best price obtainable" or at current market prices?

(c) Was defendant justified in charging against sales of sugar during a current crop year, in arriving at its net return for such year, insurance, personal property taxes and costs of reconditioning sugar from previous crops sold during such crop year?

(d) May plaintiffs now attack the final settlement under the contracts without a proper showing of either fraud [37] or mistake?

(e) Is not the determination of a reasonable price for sugar beets by the Secretary of Agriculture merely a condition precedent to his making payments under the Sugar Act?

17. In order that the Court may have before it the form contract upon which the solution of these questions depends, we have annexed Exhibits A, B, and C hereto for reference in this connection. It is submitted that this course is proper.

Rules 6 (d), 7 (b), 12 (b), 43 (e).

Weeks v. Bareco Oil Co., (7 Cir.) 125 Fed.

(2) 84.

Victory v. Manning, (3 Cir.) 128 Fed. (2d) 415.

Gallup v. Caldwell (3 Cir.) 120 Fed. (2d) 90.

Central Mexico Light & Power Co. v. Munch (2 Cir.) 116 Fed. (2d) 85.

1 Moore, Fed. Pr. (1938), p. 645, et seq.

Same, 1944 Cum. Supp., p. 666, et seq.

B. Construction of the Contracts

18. Defendant was obligated under the contracts involved to pay plaintiffs upon the basis of sugar sold during a particular crop year, irrespective of when the beets going to make up the same were raised.

In this regard the contracts provide that the price per ton for beets delivered "hereunder" shall be determined upon the average net returns received "for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1" of the crop year involved, and based upon the sugar content, etc. In view of this language, plaintiffs' position [38] that they should be paid on returns from sugar manufactured from the beets delivered during a particular crop year, irrespective of when the same were manufactured into sugar or the sugar sold, plainly is not tenable. The terms of the contract are clear; the test is average net returns from (a) sugar manufactured north of the 36th parallel, (b) and sold during the twelve months' period specified. It is submitted that to hold otherwise would be to rewrite the contract of the parties.

19. Sales by defendant of the sugar involved at current market prices was a full compliance with the contract.

It is apparent from the complaint (see for instance, paragraph numbered XXVI at pp. 15-16) that all sugar was sold at current market prices. Plaintiffs' complaint seems to be that it was not sold at the right time. We search the contract in vain for any provision requiring the sugar to be sold at any particular time or in any particular quantities or at any price whatever. Obviously sales at the current market were a full and fair compliance with the contract.

20. No showing has been made that the defendant's method of arriving at its net return was improper and in any event the contracts provide that the determination of the Certified Public Accountant shall be final.

Plaintiffs attack certain charges made against gross returns for insurance, taxes and reconditioning of sugar sold during a given crop year, but harvested in previous years. Again we must reiterate that there is nothing in the contract requiring sugar from a specified crop to be sold at any particular time. [39]

In addition to this, the contract provides (a) that there may be "deducted from the gross sales price all such charges and expenditures as are regularly and customarily deducted from the gross price of sugar," in accordance with established methods of accounting, and (b) that the determination of the Certified Public Accountant determining the net re-

turns (after these deductions, of course) shall be final.

Plaintiffs have pleaded nothing to show that the deductions in question were not such as are regularly and customarily made, nor have they suggested any theory upon which they may now attack the finality of the Certified Public Accountant's decision.

21. The final settlements under the contracts may not now be attacked in the absence of a proper showing of fraud or mistake; and none has been made.

The claims in this regard seem to relate to what are asserted to be arithmetical errors. If plaintiffs' assumptions are correct, we trust that we may be permitted to observe that such mistakes could no doubt be rectified without the necessity of resorting to the anti-trust laws.

Under the circumstances, however, we deem it proper to point out that the contracts provided for a final settlement not later than August 31st of each succeeding year. The complaint does not negative the fact that such settlements were had. Such being the case, under settled principles plaintiffs may not be permitted to reopen those final settlements in the absence of a showing of either fraud or of such mistake as would warrant relief in equity. Mere mathematical error innocently made, and open to discovery by the exercise of diligence by either party, is no ground for relief in equity. (See, for instance, *Ariss-Knapp Co. v. County of Sonoma*, 73 Cal. App. 262, 267.) Here, however, plaintiffs do not seek equitable relief; they are attempting to ignore the settle-

ment feature of the contract and proceed as if it had no existence. This, of course, they may not do.

22. The determination of a reasonable price for sugar beets by the Secretary of Agriculture is merely a condition precedent to his making payments under the Sugar Act.

All through the complaint plaintiffs lay stress upon the determination by the Secretary of Agriculture of a fair and reasonable price for sugar beets under the Sugar Act as being controlling and absolute. Recourse to the Act, however (7 U.S. C.A. Secs. 1100, et seq., particularly Sec. 1131 and subsec. (d) thereof) reveals that such determination by the Secretary is merely a condition precedent for the payment by him of benefits to certain producers and processors of sugar beets. Other conditions, for instance, are no child labor, proper wage standards, proportionate share production and proper soil preservation. Such being the case, we have moved to strike all allegations regarding the Secretary's determination as being wholly immaterial, both for the above reason and for the further reason that here we are dealing with duly executed contracts providing their own contract price.

Indeed, if we follow plaintiffs' thesis to its logical conclusion, they themselves have supplied a further ground of immateriality in this regard. The complaint alleges, on information and belief, that this defendant received payments under the Act. If we assume this statement to be true, plaintiffs are met with the provisions of Section 1136 of the Act, which

provide that the facts constituting the basis of any payment made (among which bases are, of course, the determination that the prices paid by the processor were reasonable) shall be reviewable only by the Secretary, and his determinations with respect thereto shall be final and conclusive.

It follows that, on plaintiffs' own theory of the case, they may not attack the reasonableness of defendants' prices paid for beets during the years 1939, 1940 and 1941 unless and until they have exhausted such administrative remedies before the Secretary as are reserved to them by the Act.

It is respectfully urged that for the reasons hereinabove set forth, the motions presented herewith should be granted.

Respectfully submitted,

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant. [42]

Affidavit of Service attached.

[Endorsed]: Filed Sept. 15, 1945.

[Title of District Court and Cause No. 4643]

STIPULATION AND ORDER

Whereas, in oral argument on November 13, 1945, on the motion of defendant to dismiss, etc., Hon. Ben Harrison, the United States District Judge before whom said matter was argued, stated from the bench to counsel herein that he felt that the first cause of action, if supplemented by copies of the contracts attached to the defendant's motion to dismiss, would not state facts sufficient to constitute a cause of action, and suggested that it would be a tremendous saving of time and expense if the complaint were amended (a) by setting forth copies of the agreements involved in the first count, (b) by eliminating what the Court considered an ambiguity in the complaint, and (c) by the parties entering into a stipulation to eliminate from the pleadings, for the purpose of the appeal only and without prejudice to the rights of the plaintiffs, the second and third causes of action, so as to enable the Court herein to pass upon the sufficiency of the first count on its merits and, further, [47] to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient;

Now, Wherefore, the parties stipulate, without plaintiffs' waiving their rights under the second and third counts and without prejudice to any of plaintiffs' rights thereunder, as follows, to-wit:

1. Plaintiffs will file an amended complaint herein, attaching copies of the forms of contract in use in

1938, 1939, 1940 and 1941, and omitting the second and third counts.

2. Said omission of the said second and third counts shall be without prejudice to any of the rights of the plaintiffs as to any cause or causes of action included or includable therein by amendment, and shall not be a retraxit or a dismissal with prejudice.

3. Defendant herein waives, for the period of time hereinafter set forth, any and all statutes of limitations now or hereafter applicable to the second or third causes of action or any matters therein set forth or includable therein by amendment, and waives the defense of laches as to the second and third causes of action or any matters therein set forth or includable therein by amendment.

4. Plaintiffs may, at any time prior to six months after the decision on appeal as to the sufficiency of the first count has become final, either amend the amended complaint herein by realleging said second and third counts or any portion of either, or, at any time during said period, file a separate action or actions setting forth said second and third counts or any portion of either, all with the same force and effect as if said second and third counts were continuously included herein as second and third counts from the date of the commencement of this action.

5. The waiver of the statute of limitations and of the defense of laches herein set forth, and the stipulation permitting the amendment of the amended complaint or the filing of a separate [48] action or actions hereinabove set forth, shall continue until six months

after the determination on appeal as to the sufficiency of the first count has become final.

Read, Considered and Signed this 14th day of November, 1945.

WOOD, CRUMP, ROGERS & ARNDT,
/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

[Seal] AMERICAN CRYSTAL SUGAR
COMPANY,
Defendant,

/s/ By W. N. WILDE,
Its President.

/s/ By [Illegible]
Its Secretary.

It Is So Ordered.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed Nov. 26, 1945. [49]

[Title of District Court and Cause No. 4643]

AMENDED COMPLAINT

Now come plaintiffs above named and with leave of court first had and obtained, file their Amended Complaint, and for cause of action allege:

I.

The grounds upon which the jurisdiction of the court depends are: (a) Diversity of citizenship; (b) this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States, (15 U.S.C. Sec. 15) and brought in a district in which the defendant is found and has an agent.

II.

(a) Plaintiff Mandeville Island Farms, Inc. now is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of California, with its principal place of business in Stockton, San Joaquin County, California.

(b) Defendant American Crystal Sugar Company now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent desig-

nated for service of process under and by virtue of the law of the State of California regarding foreign corporations, is, J. W. Rooney of Oxnard, Ventura County, in the above entitled district and division of California.

(c) Plaintiff Roscoe C. Zuckerman now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

III.

(a) Plaintiffs Mandeville Island Farms, Inc. and Roscoe C. Zuckerman assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown and grown on Mandeville Island which is a tract of land located in California north of the 36th parallel.

(b) Said Mandeville Island at all times herein mentioned contained large areas of land suitable in composition, drainage, irrigation, location, climate and transportation facilities for the successful raising of sugar beets suitable for processing into sugar. At all times herein mentioned plaintiffs have had supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the successful raising on Mandeville Island of sugar beets suitable for processing into raw sugar.

(c) A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences.

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

On September 11, 1939, the second world war broke out and thereafter and up to December 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defenses against its possible entry into said conflict. On December 7, 1941 the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times from September 11, 1939, the sugar beet industry was and now is one of the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continues. The various steps involved in the production and protection of beet sugar, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale

and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now [52] are inextricably intermingled with and directly affected by each other and have an immediate relation on each other. Each of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was completed when the sugar was used by the ultimate consumer.

VI.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including that portion of California north of the 36th parallel, Utah, Colorado, Michigan, Idaho, Illinois, Arizona and other states were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not har-

vested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area in California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers.

(c) The sugar manufactured from said sugar beets was, during all of said period, sold in interstate commerce throughout the United States.

(d) After the raw sugar had been produced, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any

one part of the United States from that manufactured from sugar beets grown in any other part of the United States.

(e) During said period above referred to, the only sugar beet seeds available in said portion of California were those securable from one of said three manufacturers and the only method of sale of marketable sugar beets used by growers of sugar beets in said area of California was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets. [54]

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturer. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that

were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined under the contracts by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. Attached hereto and marked Exhibit "A" is a copy of the standard contract for the crop season of 1938. It is incorporated herein by reference. But during the crop seasons of [55] 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed

contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar.

IX.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States, and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspira-

tors north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the growers of sugar beets a reasonable price for their beets, each of said conspirators furnished seeds to, entered into contracts with and bought seeds only from growers who signed a standard printed form of contract prepared by said manufacturers, identical in all material terms. Farmers contemplating or desirous of growing sugar beets either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a market to sell their marketable beets except for hog or cattle feed at a large loss. Attached hereto and marked Exhibits "B", "C" and "D", respectively, are the said standard printed form contracts for the crop years 1939, 1940 and 1941.

(e) Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in California north of the 36th parallel and set forth in said Exhibits "B", "C" and "D" are not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.

X.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales [57] and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .265 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel who had contracted with defendant re-

ceived on the average from 29½ cents to 52½ cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of identical beets of identical sugar content delivered to the other manufacturers of beet sugar in California north of the 36th parallel.

XI.

During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer any such competition between the conspirators. Plaintiffs are informed and believe and upon such information and belief allege that defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XII.

As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and

obstructed, and, instead of defendant and the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring.

XIII.

Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method

agreed upon in said conspiracy as above set forth, and will not furnish any of the growers the individual, as contrasted with the pooled, sales return of the particular manufacturer with whom said grower dealt. Plaintiffs herein demanded in writing such information of defendant but defendant refused to and has not furnished the same.

XIV.

(a) Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and were used in the sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agriculture in accordance with Sec. 301 of the said Sugar Act. (7 U.S.C. 1131.) Claude R. Wickard was at all times mentioned in this paragraph the duly appointed, qualified and acting Secretary of Agriculture. On December 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to Section 301d of said Sugar Act (7 U.S.C. 1131 (d)) made the following determination of the fair and reasonable price for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231)

"Fair and reasonable prices for the 1940 and 1941

crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule: [60]

Percentum sucrose in in beets	Average net return per 100 lbs. of sugar				
	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00
	Price per ton of sugar beets				
19.....	\$7.12	\$6.65	\$6.18	\$5.70	\$5.22
18.....	6.66	6.21	5.76	5.31	4.86
17.....	6.20	5.78	5.36	4.93	4.50
16.....	5.76	5.36	4.96	4.56	4.16
15.....	5.32	4.95	4.58	4.20	3.82
14.....	4.90	4.55	4.20	3.85	3.50

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content, higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however, That in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, That a haulage allowance at a rate not less than 2½ cents per mile per ton shall be granted to growers who perform such service in areas in which allowances have been agreed upon between producer-processors and growers."

(b) No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or with-

drawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination.

(c) The said determination of the Secretary of Agriculture under the Sugar Act of 1937 as to the fair and reasonable prices for the 1940 and 1941 California crops of sugar beets was made December 21, 1940 and was published in the Federal Register on December 24, 1940 as aforesaid, but, nevertheless, defendant and its said co-conspirators, each of whom took part in the said hearings held by the Secretary of Agriculture, and each of whom well knew of the determination, persisted thereafter in their said conspiracy and would not buy beets from growers in California north of the 36th parallel except under the terms and conditions set forth in said standard agreement.

XV.

On November 14, 1938, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25% from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar.

Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVI.

On December 29, 1939, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on August 31, 1941, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 tons of sugar beets of an average sugar content of 15.55% from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar. Said plaintiff does not know when said beets were manufactured into sugar by defendant. Said information [62] is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVII.

On June 23, 1941, defendant and plaintiff Roscoe C. Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay plaintiff on

August 31, 1942, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47% from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVIII.

Defendant paid plaintiffs for their 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiff on said respective dates, not upon the price secured in interstate commerce from sugar manufactured from beets delivered by plaintiff and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel, as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases determined by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce for sugar by all manufacturers of beet sugar with refineries [63] in California north of the 36th parallel and in accordance with the schedule set forth in the said standard con-

tracts. Plaintiffs are informed and believe and upon such information and belief allege that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiffs for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XIX.

By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in viola-

tion of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid.

XX.

Plaintiffs, in order to enforce their rights against defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), are entitled to reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys.

XXI.

From October 10, 1942 to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942 (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1944 Cum. An. P. P. Title 15, Sec. 16, p. 76), which was in full force and effect between October 10, 1942 and June 30, 1945.

Wherefore, plaintiffs pray judgment against defendant as follows:

1. That defendant be required to account to plaintiffs in connection with all sugar beets delivered by plaintiffs to defendant during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.

2. That plaintiff Mandeville Island Farms, Inc. have judgment for the sum found to be due it by

said accounting and that the amount so found due be trebled.

3. That plaintiff Roscoe C. Zuckerman have judgment for the sum found to be due him by said accounting and that the amount so found due be trebled.

4. That plaintiff Mandeville Island Farms, Inc. have judgment against the defendant for \$315,043.80 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

5. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for \$112,192.14 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem [65] reasonable.

6. That plaintiffs have judgment for their costs herein involved and attorney fees.

7. That plaintiffs have such other and further relief as may be fit and proper in the premises.

WOOD, CRUMP, ROGERS & ARNDT,

/s/ STANLEY M. ARNDT,

Attorneys for Plaintiffs.

([66])

EXHIBIT "A"

Form 3549-D—1000

Memorandum of Agreement—Season 1938

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

For delivery of Sugar Beets at.....

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest and deliver during the season of 1938, in compliance with the directions of The Company, as given from time to time,..... acres of sugar beets, to be grown on the following described land, to-wit:.....
.....State of California.

2. The seed to be used in growing said beets shall be furnished by The Company for the price of fourteen (14) cents per pound, which The Grower agrees to pay. Seed furnished by The Company shall not be planted upon any land not contracted to The Company. Any seed furnished by The Company and not planted shall be returned in good order to The Company, at the end of the planting season, and The Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1938.

Exhibit "A"—(Continued)

3. The Grower agrees that beets hereunder shall not be irrigated after July 15, 1938, except by written permission of The Company.

The Grower Agrees That At His Own Expense He Will Harvest and Deliver to the Company All Beets Grown by Him; Said Delivery to be Made at Such Times and in Such Quantities and to Such Place or Places As May Be Designated by the Company. All beets delivered hereunder shall be properly topped; that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt and foreign substances liable to interfere with factory work and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

5. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract, by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets, beets of less than 12% sugar, or less than 80% purity, or beets that are not suitable in the judgment of The Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

Exhibit "A"—(Continued)

In no event shall The Company be liable to The Grower for partial or complete failure of crop, or for any injury or damage to beets.

6. All sound beets grown in accordance with and under this contract shall be bought by The Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to The Company shall be determined upon the average net return (said net return being defined in Paragraph No. 7 hereof) per one hundred pounds of sugar received by The Company from sugar manufactured at its Clarksburg Factory, and sold by The Company during the period of twelve months commencing August 1, 1938, and based upon The Company's test of the sugar content of the individual grower's beets in accordance with the following schedule:

Percentage Sugar in Beets

Net Price
Received

for Sugar 23% 22% 21% 20% 19% 18% 17% 16% 15% 14% 13%

Value of One Ton of Beets Expressed in Dollars and Cents

5.00.....	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4.75.....	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4.50.....	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4.25.....	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4.00.....	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3.75.....	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3.50.....	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3.25.....	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval

Exhibit "A"—(Continued)

in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased according to the foregoing formula, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation, provided also that if the net return for sugar should fall below \$3.25 per hundred, in such event the price per ton of beets hereinbefore fixed by this paragraph shall be further decreased in the proportion of one per cent. (1%) for each five cents (5c) of decrease in the net return per one hundred pounds of sugar below \$3.25.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of The Company based upon The Company's test of sugar content of the individual grower's beets and The Company's estimate of the net returns to be received by it for sugar sold during the twelve months period beginning August 1, 1938. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as The Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with

Exhibit "A"—(Continued)

the terms of this contract not later than August 31, 1939.

7. The net return on sugar sold as aforesaid during said period shall be determined by deducting, from the gross sales price, selling expenses directly applicable to sugar consisting of freight, discount, brokerage, storage, shipping and handling, loss and damage, insurance, advertising, salaries, traveling expenses and sundry expenses, and also any expenses or taxes occasioned by act of law or State or Federal regulation. The Company will furnish for the inspection of growers a certified statement by certified public accountants, not connected with The Company, of the net receipts from sugar sold, in accordance with this contract.

8. Any advances by The Company to The Grower either in seed, money or otherwise, shall constitute a debt from The Grower to The Company which The Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from The Grower to The Company shall be, become and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by The Company from any initial or subsequent payments

Exhibit "A"—(Continued)

from The Company to The Grower which shall become due hereunder, or under any subsequent Beet Contract between The Company and The Grower. If the beet crop to be grown hereunder is grown on leased land payments to become due hereunder from The Company to The Grower shall be payable jointly to The Grower and the landlord unless the landlord shall have previously filed with The Company his written release in form satisfactory to The Company.

9. The Grower may, at his own expense, have representatives (weighmen, taremen and chemists) in scale house, tare room and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to The Company.

10. It is understood and agreed that if any governmental authority shall establish any restriction, allotment or quota upon the growing, production or processing of beets, or the output, transportation or sale of beet sugar, then the Company may reduce to the extent which it deems necessary the quantity of beets herein contracted for, and shall be obligated to purchase only such reduced quantity.

11. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent The Grower from the performance of this contract or The Company from utilizing the beets contracted for in the manu-

Exhibit "A"—(Continued)

facture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

12. The Company, at its sole option and election, unless notified in writing by The Grower prior to July 1, 1938 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents per ton on The Grower's share of the beets delivered by The Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

13. No agent of The Company is authorized to make any alterations, erasures or additions to this printed form of contract.

14. This agreement shall be binding upon both The Grower, his heirs, legal representatives and assigns, and upon The Company, its successors and assigns, and shall not be transferable by The Grower without the written consent of The Company, its successors and assigns.

Executed in duplicate originals this.....day
of....., 193...

.....Grower

.....Grower

AMERICAN CRYSTAL SUGAR
COMPANY [67]

EXHIBIT "B"

Form 3549-D—1500

Memorandum of Agreement—Season 1939

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

For delivery of Sugar Beets at.....

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest, and deliver during the season of 1939, in compliance with the directions of the Company, as given from time to time..... acres of sugar beets, to be grown on the following described land, to-wit:..... State of California.

2. The seed to be used in growing said beets shall be furnished by the Company for the price of fourteen cents (14c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1939.

Exhibit "B"—(Continued)

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judgment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and

Exhibit "B"—(Continued)

under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1939, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

		Percentage Sugar in Beets										
Net Return Received for Sugar		23%	22%	21%	20%	19%	18%	17%	16%	15%	14%	13%
Value of One Ton of Beets Expressed in Dollars and Cents												
5	cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾	“	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½	“	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼	“	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4	“	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾	“	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½	“	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼	“	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased according to the foregoing formula, using the immedi-

Exhibit "B"—(Continued)

ately succeeding or preceding interval, as the case may be, as the basis for calculation, provided also that if the net return for sugar should fall below \$3.25 per hundred, in such event the price per ton of beets hereinbefore fixed by this paragraph shall be further decreased in the proportion of one per cent (1%) for each five cents (5c) of decrease in the net return per one hundred pounds of sugar below \$3.25.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1939. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1940.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose determination

Exhibit "B"—(Continued)

shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower. If the beet crop to be grown hereunder is grown on leased land, payments to become due hereunder from the Company to the Grower shall be payable jointly to the Grower and the landlord unless the landlord shall

Exhibit "B"—(Continued)

have previously filed with the Company his written release in form satisfactory to the Company.

8. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale houses, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1939 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum

Exhibit "B"—(Continued)

of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. No agent of the Company is authorized to make any alterations, erasures, or additions to this printed form of contract.

13. This agreement shall be binding upon both the Grower, his heirs, legal representatives, and assigns, and upon the Company, its successors and assigns, and shall not be transferable by the Grower without the written consent of the Company, its successors and assigns.

Executed in duplicate originals this.....day
of....., 193....

.....Grower

.....Grower

AMERICAN CRYSTAL SUGAR
COMPANY

By

[68]

EXHIBIT "C"

1500—3549-D—10-39

Memorandum of Agreement—Season 1940

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest, and deliver during the season of 1940, acres of sugar beets, to be grown on the lands described on the reverse side hereof.

2. The seed to be used in growing said beets shall be furnished by the Company for the price of fourteen cents (14c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1940.

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times

Exhibit "C"—(Continued)

and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judgment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

Exhibit "C"—(Continued)

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1940, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

Percentage Sugar in Beets

Net Return
Received

for Sugar	23%	22%	21%	20%	19%	18%	17%	16%	15%	14%	13%
Value of One Ton of Beets Expressed in Dollars and Cents											
5 cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾ "	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½ "	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼ "	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4 "	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾ "	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½ "	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼ "	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45
3 "	5.55	5.31	5.07	4.83	4.53	4.30	4.06	3.77	3.49	3.21	2.95

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in which such fluctuations occur. If sugar prices or such beets shall be increased or decreased according to the foregoing formula, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation.

Exhibit "C"—(Continued)

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1940. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1941.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose determination shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute

Exhibit "C"—(Continued)

a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower.

8. The Grower may, at his own expense, have representatives (weighmen, tareman, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the con-

Exhibit "C"—(Continued)

trol of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1940 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. The beet crop covered hereby is to be grown on land leased by the grower from..... (hereinafter called "Landowner") whose address is....., wherefore, the Company is authorized to pay....per cent of the gross amount due hereunder to the said Landowner, his heirs, personal representatives, or assigns.

13. No agent of the Company is authorized to make any alterations, erasures, or additions to this printed form of contract.

14. This agreement shall be binding upon both the Grower, his heirs, legal representatives, and assigns, and upon the Company, its successors and assigns, and shall not be transferable by the Grower without the written consent of the Company, its successors and assigns.

Exhibit "C"—(Continued)

Executed in duplicate originals this.....day
of....., 19....

.....Grower.

.....Grower.

Landowner.....

(To be signed by landowner or
agent)

AMERICAN CRYSTAL SUGAR
COMPANY

By..... [69]

EXHIBIT "D"

1500—3549-D—11-40

Memorandum of Agreement—Season 1941

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

Witnesseth, that for and in consideration of the
mutual covenants and payments hereinafter set out,
the respective parties hereto mutually undertake and
agree as follows, to-wit:

1. The Grower will prepare land for, plant, block,
thin, cultivate, irrigate, harvest, and deliver during
the season of 1941,.....acres of sugar beets,
to be grown on the lands described on the reverse
side hereof.

2. The seed to be used in growing said beets shall

Exhibit "D"—(Continued)

be furnished by the Company for the price of thirteen cents (13c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1941.

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judg-

Exhibit "D"—(Continued)

ment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1941, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

Percentage Sugar in Beets

Net Return
Received

for Sugar	23%	22%	21%	20%	19%	18%	17%	16%	15%	14%	13%
Value of One Ton of Beets Expressed in Dollars and Cents											
5 cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾ "	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½ "	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼ "	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4 "	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾ "	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½ "	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼ "	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45
3 "	6.00	5.74	5.48	5.22	4.90	4.64	4.39	4.08	3.77	3.48	3.19

Exhibit "D"—(Continued)

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased proportionately, using the immediately succeeding or preceding interval as the case may be, as the basis for calculation.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1941. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1942.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose determination shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and

Exhibit "D"—(Continued)

customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company, shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower.

8. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, al-

Exhibit "D"—(Continued)

lotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1941 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. The beet crop covered hereby is to be grown on land leased by the grower from.....(hereinafter called "Landowner") whose address is....., wherefore, the Company is authorized to pay....per cent of the gross amount due hereunder to the said Landowner, his heirs, personal representatives, or assigns.

Exhibit "D"—(Continued)

13. No agent of the Company is authorized to make any alterations, erasures, or additions to this printed form of contract.

14. This agreement shall be binding upon both the Grower, his heirs, legal representatives, and assigns, and upon the Company, its successors and assigns, and shall not be transferable by the Grower without the written consent of the Company, its successors and assigns.

Executed in duplicate originals this.....day
of....., 19....

.....Grower.

.....Grower.

Landowner.....

(To be signed by landowner or
agent)

AMERICAN CRYSTAL SUGAR
COMPANY

By [70]

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 1, 1945.

SUMMARIZATION OF BEET SUGAR
CONTRACTS

Exhibits 1 to 19, inclusive, of "Amendment to Answer to First Amended Complaint as Amended" are specimen copies of the contracts in force during the crop years 1939, 1940 and 1941 between the manu-

facturers who operated sugar beet factories in Southern California and the growers in said area. Exhibit 1 was the 1938-39 Imperial Valley contract of Los Alamitos Sugar Company (hereinafter called "Alamitos") and Holly Sugar Corporation (hereinafter called "Holly"). Exhibits 2, 3 and 6 were the 1939, 1940 and 1941 Holly contracts. Exhibits 4 and 7 were the 1940 and 1941 Alamitos and Holly contracts. Exhibit 5 was the 1940-41 Alamitos and Holly Imperial Valley contract. Exhibits 8, 11 and 13 were the Union Sugar Company (hereinafter called "Union") coastal contracts for 1939, 1940 and 1941. Exhibit 9 was the Alamitos contract for 1941. Exhibits 10 and 12 were the Union contracts for the Southern San Joaquin Valley for 1939 and 1940. Exhibits 14, 16 and 18 were the American Crystal Sugar Company (hereinafter called "Crystal") coastal contracts for 1939, 1940 and 1941. Exhibits 15, 17 and 19 were Crystal's 1939, 1940 and 1941 contracts for the Southern San Joaquin Valley. Contracts Exhibit 10, 12, 15, 17 and 19 were substantially the same as Crystal's Clarksburg contracts for 1939, 1940 and 1941, Exhibits B, C and D of the Amended Complaint, except that Clarksburg contracts as well as the contracts used by the other sugar companies in 1939, 1940 and 1941 in Northern California provided that the price to be paid for beets was determined by a formula in which one variable was the sugar content of the beets grown by the particular grower, and the other was the average net return received for sugar manufactured at the beet sugar factories located in California north of the 36th

parallel and sold during the period of 12 months commencing August 1 of the crop year in question, while Exhibits 10, 12, 15 and 17 provided for payment by a formula in which one of the variables was the sugar content of beets grown by the particular grower, and the other was the average net returns received for sugar manufactured by the four southernmost beet sugar companies in Southern California for sugar manufactured at their Southern California factories during said 12-month period. Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 16 and 18 to the "Amendment to Answer to First Amended Complaint as Amended" were substantially the same as Exhibits 10, 12, 15, 17 and 19, except that the schedules set forth therein (while substantially the same as each other) provided for a higher payment to the grower than the similar schedules in contracts Exhibits 10, 12, 15, 17 and 19, and Exhibits B, C and D above referred to.

[Title of District Court and Cause No. 4643]

NOTICE OF MOTION TO DISMISS OR IN
THE ALTERNATIVE TO STRIKE FROM
AMENDED COMPLAINT

To Plaintiffs in the Above Entitled Action and to
Messrs. Wood, Crump, Rogers & Arndt, Their
Attorneys:

Please Take Notice that defendant above named
will, on Monday, December 17, 1945, at the hour of
10:00 o'clock a.m., or as soon thereafter as counsel
may be heard, move the above entitled court, in
Court Room No. 6 thereof, in the United States Court
House and Post Office Building, Los Angeles, the
Honorable Ben Harrison, Judge Presiding, as fol-
lows:

1. To dismiss the action because the amended com-
plaint [72] fails to state a claim against defendant
upon which relief can be granted.

2. To dismiss the action because the amended com-
plaint fails to state a claim against defendant upon
which relief can be granted under the anti-trust laws
of the United States, or any thereof.

3. To dismiss the action in so far as it purports
to state a cause of action under any California
statute because the same is barred by the provisions
of Section 359 of the Code of Civil Procedure of
California.

4. In the alternative, and in the event the above
motion to dismiss is for any reason denied, to strike

from the amended complaint, because immaterial, the following parts or portions thereof:

(a) The whole of paragraph numbered XIV, pages 11-13.

(b) That part of paragraph IX appearing on page 8 thereof and reading as follows:

“The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.”

Dated: December 7, 1945.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant. [73]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Motion to Dismiss

1. In order to state a cause of action under the anti-trust laws, it is necessary to show that the activities complained of either had or were intended to have a direct effect upon prices of the interstate commodity—here sugar, as distinguished from the sugar beets—or otherwise to deprive purchasers or consumers of the sugar of the advantages which they would derive from free competition; and no such showing has been made.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-502.

Chicago Board of Trade v. U. S., 246 U.S. 231, 238.

U. S. v. U. S. Steel Co., 251 U.S. 417.

U. S. v. International Harvester Co., 224 U.S. 693.

Appalachian Coals v. U. S., 288 U.S. 344, 375.

2. The production and manufacture of goods or commodities is not commerce, nor does the fact that the same are intended to be shipped in interstate commerce after their manufacture make them a part thereof. Interstate Commerce begins by the actual delivery of the manufactured commodity—here the sugar—to a carrier for transportation or the actual commencement of its transfer to another state.

Hopkins v. U. S., 171 U.S. 578, 588, 591-592.

United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 407-8, 410-13.

United Leather Workers v. Herkert etc. Trunk Co., 265 U.S. 457, 471. [74]

Industrial Assn. v. U. S., 268 U.S. 64, 82.

Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 107.

Hammer v. Dagenhart, 247 U.S. 251.

D. L. & W. R. R. Co. v. Yurkonis, 238 U.S. 439.

Coe v. Errol, 116 U.S. 517, 525, 528.

Kidd v. Pearson, 128 U.S. 1.

Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245.

McCluskey v. Marysville & N. Ry. Co., 243 U.S. 46.

Arkadelphia Co. v. St. L. S. W. Ry. 249 U.S. 134.
Crescent Oil Co. v. Mississippi, 257 U.S. 129.

3. The foregoing statements apply as fully to sugar as to any other commodity. Interstate commerce does not begin until the sugar is manufactured and shipped.

U. S. v. E. C. Knight Co., 156 U.S. 1, 12, 13, 16-17.

Utah-Idaho Sugar Co. v. Federal Trade Com., 8 Cir. 22 Fed. (2d) 122, 125-6.

U. S. v. Great Western Sugar Co., D. C. Neb., 39 Fed. (2d) 149.

4. That the interference with interstate commerce condemned by the anti-trust laws must be direct and not remote or conjectural, is well settled.

See authorities above; also

McJunkin v. Richfield Oil Co., N. D. Cal., 33 Fed. Supp. 466.

Gable v. Vonnegue Mach. Co., 6 Cir., 274 Fed. 66.

Boro Hall Corp. v. Genl. Motors Corp., D. C. N. Y., 37 Fed. Supp. 999. [75]

5. The requirement that the interference be direct and not remote is especially necessary where, as here, the injury claimed only relates to the plaintiffs' business in its intrastate aspects. An alleged conspiracy which is aimed at restraining a local enterprise and which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of the anti-trust laws.

Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 Fed. (2d) 742, 753-4.

Abonaf v. J. D. & A. B. Spreckels Co., N. D. Cal., 26 Fed Supp. 830, 833.

Compare:

U. S. v. Patten, 226 U.S. 525.

Field v. Barber Asphalt Paving Co., 194 U.S. 618.

Lynch v. Magnavox Co., Inc., 9 Cir., 94 Fed. (2d) 883.

Lipson v. Socony-Vacuum Corp., 1 Cir., 76 Fed. (2d) 213.

6. Only those damages may be recovered in an anti-trust suit which are the proximate result of a violation of the anti-trust laws. It is not enough to allege something ostensibly forbidden by those laws and claim general damages arising therefrom.

McJunkin v. Richfield Oil Corp., N. D. Cal., 33 Fed. Supp. 466.

Sullivan v. Associated Billposters, D.C.N.Y., 272 Fed. 323.

Westmoreland Asbestos Co. v. Johns-Manville, 30 Fed. Supp. 389.

Gerli v. Silk Assn., D.C.N.Y., 36 Fed. (2d) 959.

Twin Ports Oil Co. v. Pure Oil Co., D.C. Minn., 46 Fed. Supp. 149. [76]

Miller Oil Co. v. Socony-Vacuum Oil Co., 37 Fed. Supp. 831.

7. Defendant is not advised as to whether plaintiffs intend to assert that even though no violations of the anti-trust acts have been shown, the facts alleged nevertheless state a claim upon which relief could be granted under the California anti-mono-

poly statute. (Cartwright Act, Calif. Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; recodified as Business and Professions Code Secs. 16720-16726, 16750-16758.) A somewhat similar situation was considered in the Alabama case of Dothan Oil Mill Co. v. Espy, 127 So. 178, which very closely resembled the present case on the facts. However, there are two sufficient answers to such a contention.

8. Both this Court and the appellate courts of California have held the Cartwright Act unconstitutional in that it provides no fixed standard of guilt, due to the "reasonable profit" exceptions embodied in the amendment of 1909. (See Bus. & Prof. Code, sec. 16723.)

Blake v. Paramount Pictures, (S.D. Cal.) 22 Fed. Supp. 249.

Ward v. Auctioneers' Ass'n, 67 A.C.A. 194.

Compare: Cline v. Frink Dairy, 274 U.S. 445.

9. In any event, any cause of action under the Cartwright Act for activities during 1939, 1940 or 1941 were barred three years after the creation of any liability thereunder.

California Code of Civil Procedure, Sec. 359.

10. If it be assumed (which defendant does not admit) that defendant and the other two processors of sugar beets in California north of the 36th parallel unlawfully combined or conspired to restrain interstate commerce because their standard form crop contracts for the years 1939-1941, inclusive, provided that the prices to be paid the growers for their beets should be based upon the average net return from

sugar sold by all three processors rather than upon the net return from sugar sold by the particular processor with whom the grower contracted, then plaintiffs are co-conspirators because they voluntarily entered into contracts wherein the prices for beets were fixed in violation of the anti-trust laws. Plaintiffs were under no compulsion to purchase seed from defendant and produce sugar beets on their land; they might have planted their land to any crop they chose. Hence, plaintiffs stand in *pari delicto* with defendant and are entitled to no redress.

Harriman v. Northern Securities Co. (1905),
197 U.S. 244, 49 L. Ed. 739.

Bluefields S.S. Co. v. United Fruit Co. (C.C.A.
3, 1917) 243 Fed. 1, error dismissed (1919)
248 U.S. 595, 63 L.Ed. 438.

Eastman Kodak Co. v. Blackmore (C.C.A. 2,
1921) 277 Fed. 694.

American & British Mfg. Corp. v. New Idria
Quicksilver Mining Co. (C.C.A. 1, 1923) 293
Fed. 509.

Tilden v. Quaker Oats Co. (C.C.A. 7th, 1924) 1
Fed. (2d) 160.

New Century Mfg. Co. v. Scheurer (Tex. Comm.
of App. 1932) 45 S.W. (2d) 560;

Patterson v. Imperial Window Glass Co. (1914)
91 Kans. 201, 137 Pac. 955.

See Northwestern Oil Co. v. Socony-Vacuum Oil
Co. (C.C.A. 7th, 1943) 138 Fed. (2d) 967, 971,
cert. denied (1944) 321 U.S. 792, 88 L.Ed.
1081. [78]

II. Motion to Strike

11. The determination of a reasonable price for sugar beets by the Secretary of Agriculture is merely a condition precedent to his making payments under the Sugar Act.

Plaintiffs lay stress upon the determination by the Secretary of Agriculture of a fair and reasonable price for sugar beets under the Sugar Act as being controlling and absolute. Recourse to the Act, however (7 U.S.C.A. Secs. 1100, et seq., particularly Sec. 1131 and subsec. (d) thereof) reveals that such determination by the Secretary is merely a condition precedent for the payment by him of benefits to certain producers and processors of sugar beets. Other conditions, for instance, are no child labor, proper wage standards, proportionate share production and proper soil preservation. Such being the case, we have moved to strike all allegations regarding the Secretary's determination as being wholly immaterial, both for the above reason and for the further reason that here we are dealing with duly executed contracts providing their own contract price.

Indeed, if we follow plaintiffs' thesis to its logical conclusion, they themselves have supplied a further ground of immateriality in this regard. The complaint alleges, on information and belief, that this defendant received payments under the Act. If we assume this statement to be true, plaintiffs are met with the provisions of Section 1136 of the Act, which

provide that the facts constituting the basis of any payment made (among which bases are, of course, the determination that the prices paid by the processor were reasonable) shall be reviewable only by the Secretary, and his determinations with respect thereto shall be final and conclusive. [79]

It follows that, on plaintiffs' own theory of the case, they may not attack the reasonableness of defendant's prices paid for beets during the years 1939, 1940 and 1941 unless and until they have exhausted such administrative remedies before the Secretary as are reserved to them by the Act.

It is respectfully urged that for the reasons hereinabove set forth, the motions presented herewith should be granted.

Respectfully submitted,

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of service attached.

[Endorsed]: Filed Dec. 8, 1945.

In the District Court of the United States
Southern District of California
Central Division

No. 4643-BH

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,
Plaintiffs,
vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Defendant.

ORDER GRANTING MOTION TO DISMISS
AND JUDGMENT OF DISMISSAL

(Ordered, adjudged and decreed that the action be and the same hereby is dismissed.)

The defendant herein having duly moved to dismiss the above entitled action and said motion having been duly argued and submitted

It Is Ordered that said motion be and the same hereby is granted, wherefore:

It Is Ordered, Adjudged and Decreed that said action be and the same hereby is dismissed.

Dated January 14, 1946.

/s/ BEN HARRISON,
Judge.

Approved as to form pursuant to Rule 7(a)

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for plaintiffs.

Judgment entered Jan. 14, 1946. Docketed Jan. 14,
1946. Book 36, Page 454.

[Endorsed]: Filed Jan. 14, 1946. [82]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO AMENDED COMPLAINT

Now come Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman, and, pursuant to that certain Stipulation and Order herein dated November 14, 1945, and filed November 26, 1945, amends the amended complaint herein by adding thereto a Second and a Third count, as follows:

As a Second Count, plaintiff, Mandeville Island Farms, Inc., alleges:

XXII.

Said plaintiff refers to paragraphs I and XX of the First Count or cause of action and incorporates the same herein by reference as though herein set forth in full. [83]

XXIII.

Commencing the latter part of December, 1940, and continuing until March, 1941, the price of sugar increased in value by the amount of approximately 75c per 100 lbs. and remained at said higher prices

or even still higher prices for many months thereafter. Said plaintiff Mandeville Island Farms, Inc. is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar at the higher prices that prevailed subsequent to April 1, 1941, retained most of it and sold it subsequent to August 31, 1941, at the high prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided for in the contract for said sugar, but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1940 and delivered during said crop season under said standard form of contract but used the prices obtained for sugar sold from August 1, 1940 to August 31, 1941, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1940 and which was grown and delivered in previous crop seasons and which was sold by said defendant and the other manufacturers at the lower prices that prevailed from August 1, 1940 to December 31, 1940, instead of at the higher prices that prevailed when the 1940 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, and the other manufacturers, well knowing that the price of sugar would rise prior to January 1, 1941, made various sales prior thereto after it and they had such knowledge to various purchasers so that

the purchasers would reap the profits resulting from the increased price which defendant and said other corporations knew was about to occur, at the expense, detriment and loss of said [84] plaintiff and other growers under like contracts.

XXIV.

Defendant has paid to said plaintiff the sum of \$102,767.13 for 25,430.3 tons of sugar beets of 15.55% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1940 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1940 crop season, but upon the sales made during the 1940 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and believes and, upon such information and belief, alleges that said sales were composed mainly of sugar manufactured previous to the 1940 season from beets not produced or delivered during the 1940 season.

XXV.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1940 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or

means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from the beets delivered during the 1940 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXVI.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1940 crop at the best price [85] obtainable but sacrificed portions of the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant and are not known to plaintiff.

XXVII.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1940, charged as expenses various improper amounts which should not

have been charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive [86] and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XXVIII.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$102,767.13 paid to plaintiff as aforesaid, was based upon 25,430.3 tons of beets of an average sugar content of 15.55%

and upon an alleged net return per 100 lbs. of sugar of \$3.160. In arriving at said sum of \$102,767.13, defendant erroneously and contrary to said agreement took an intermediate sugar price of \$4.04. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.160 was correct) would be \$4.04272 instead of \$4.04. As a result, defendant underpaid said plaintiff \$.00272 per ton, or a total of \$69.27, assuming that the net return per 100 lbs. of sugar was \$3.160.

(b) Furthermore defendant calculated the amount to be paid said plaintiff Mandeville Island Farms, Inc. for the 1940 crop upon the said schedule set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of a sugar content of 15.55% made into sugar which returned an average of \$3.160 per 100 lbs. to the manufacturer would pay the grower \$4.255 a ton, under the said determination schedules instead of \$4.04 a ton under the standard contract, schedule, a difference of 21 cents a ton or \$5,467.52 on 25,430.3 tons, which sum is due and unpaid to said plaintiff in addition to the other sums herein referred to.

As a Third Count, plaintiff, Roscoe C. Zuckerman, alleges:

XXIX.

Plaintiff refers to paragraphs I to XX of the First [87] Count and incorporates the same herein by reference as though set forth herein in full.

XXX.

On January 1, 1942, the price of sugar increased substantially in price, and during the month of April, 1942, the price of sugar again increased substantially in price and remained at said higher price for many months thereafter. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar on or before August 31, 1942, at the high prices that prevailed from April until August, 1942, sold but little of it and retained most of it and sold it subsequent to August 31, 1942, at the higher prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1941 and delivered during said crop season under said contract, but used the prices obtained for sugar sold from August 1, 1941 to August 31, 1942, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1941 and which was grown and delivered in previous crop seasons and which was sold at the lower prices that prevailed from August 1, 1941 to December 31, 1941, instead of at the higher prices that prevailed when the 1941 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant and the other sugar manufac-

turers, well knowing that the price of sugar would rise on January 1, 1942, made various sales prior thereto after it had such knowledge to various purchasers so that the purchasers would reap the profits resulting from the increased price which defendant knew was about to occur, at the expense, detriment and loss of said [88] plaintiff and other growers under like contracts.

XXXI.

Defendant has paid to said plaintiff the sum of \$74,794.76 for 14,144.7 tons of sugar beets of 15.47 average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1941 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1941 crop season, but upon the sales made during the 1941 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and believes and, upon such information and belief, alleges that said sales were composed mainly of sugar manufactured previous to the 1941 season from beets not produced or delivered during the 1941 season.

XXXII.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1941 season, but defendant has refused to and will not furnish and has not furnished

any such accounting and plaintiff has no way or means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from beets delivered during the 1941 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXXIII.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1941 crop at the best price obtainable [89] but sacrificed what it did sell, as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant and not known to said plaintiff.

XXXIV.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1941, charged as expenses various improper amounts which should not

have been charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at [90] least \$5,000.00.

XXXV.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$74,794.76 paid to plaintiff as aforesaid, was based upon 14,144.7 tons of beets of an average sugar content of 15.47% and upon an alleged net return per 100 lbs. of sugar of \$3.950. In arriving at said sum of \$74,794.76, de-

fendant erroneously and contrary to said agreement took an intermediate sugar price of \$5.29. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.950 was correct) would be \$5.32128 instead of \$5.29. As a result, defendant underpaid said plaintiff \$.03128 per ton, or a total of \$442.45, assuming that the net return per 100 lbs. of sugar was \$3.950.

(b) Furthermore, defendant calculated the amount to be paid said plaintiff Roscoe Zuckerman for the 1941 crop upon the said schedules set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of sugar content of 15.47% made into sugar which returned on an average \$3.950 per 100 lbs. to the manufacturer would pay the grower \$5.46048 a ton under the said determination schedule instead of \$5.29 as paid by defendant to plaintiff, a difference of \$.17048 a ton or \$2411.39 on 14,144.7 tons, which sum is due and unpaid to said plaintiff in addition to the other sums referred to herein.

Wherefore, plaintiffs pray judgment as by their amended complaint herein sought.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 23, 1948.

At a stated term, to-wit: The February Term. A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 12th day of July in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause No. 4643.]

MINUTE ORDER

On motion of Emmet H. Wilson, Jr., appearing for plaintiffs, Court orders Mandate of Supreme Court of U.S.A. as of June 21, 1948, filed and entered in minutes, to wit:

United States of America, ss:

The President of the United States of America,

[Seal]

MANDATE

To the Honorable the Judges of the District Court of the United States for the Southern District of California,

Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, in a cause between Mandeville Island Farms, Inc., and Roscoe C. Zuckerman, Appellants, and American Crystal Sugar Company, Appellee, wherein the judgment of the said Circuit Court of Appeals, entered in said

cause on the 14th day of January, A.D. 1947, is in the following words, viz:

“This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellants.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellants, for costs herein expended, and have execution therefor.” [94]

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears. [95]

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that the said appellants, Mandeville Island

Farms, Inc., et al., recover from the said appellee One Hundred Twenty-three Dollars and Seventeen Cents for their costs herein expended and have execution therefor.

And it is further ordered, That this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of California for further proceedings in conformity with the opinion of this Court.

May 10, 1948.

[96]

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and forty-eight.

Cost of appellants: Clerk, \$85.00; printing part of record, \$18.17; Attorney, \$20.00; Total, \$123.17.

/s/ CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

[Endorsed]: Filed July 12, 1948 as of June 21, 1948. [97]

[Title of District Court and Cause No. 4643.]

ANSWER

Defendant for answer to the amended complaint herein, as amended, (hereinafter referred to as "said complaint") and to the several counts or claims therein set forth, admits, denies, and alleges as follows:

First Defense

1. Alleges that said complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Alleges that the first count set forth in said complaint fails to state a claim upon which relief can be granted. [99]

Third Defense

3. Alleges that the second count set forth in said complaint fails to state a claim upon which relief can be granted.

Fourth Defense

4. Alleges that the third count set forth in said complaint fails to state a claim upon which relief can be granted.

Fifth Defense—Answer to First Count

5. Denies each and every allegation contained in said first count of said complaint, except the following:

(a) Admits diversity of citizenship as between

plaintiff and defendants and each of them and that said count is brought under the anti-trust laws against a defendant found within the Southern District of California and having an agent therein.

(b) Admits the allegations contained in Paragraphs II, III and IV of said count.

(c) Admits the allegations of Paragraph V commencing at line 14 of page 3 of said complaint and ending at line 26 of said page.

(d) Admits the allegations contained in subparagraph (a) of Paragraph VI.

(e) Admits that the principal market available to sugar beet growers in California north of the 36th parallel during the period 1938-1942 consisted of three sugar manufacturers, [100] of which defendant was one; and alleges that it is without knowledge or information sufficient to form a belief as to whether any of such growers could or could not have sold their beets at a profit to any other manufacturer.

(f) Admits the allegations contained in subparagraphs (c) and (d) of said Paragraph VI.

(g) Admits that this defendant had sugar beet seeds available during the said period for growers who contracted with it under form contracts of the type referred to in the next succeeding subparagraph (h) of this Paragraph 5; admits that it is its understanding that the other manufacturers referred to in Paragraph VI of said first count likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources.

(h) Admits the authenticity of the form and contents of those certain contracts, copies of which are annexed to said complaint and marked respectively Exhibits A, B, C and D; and admits and alleges that such contracts were each in use and were duly executed and duly performed according to their terms during and with relation to the particular crop year specified therein by this defendant and by any and all growers contracting with this defendant during such crop year, including plaintiff Mandeville Island Farms, Inc. for the crop years 1939 and 1940 and plaintiff Zuckerman for the crop year 1941.

(i) Admits the allegations contained in Paragraph X. [101]

(j) Admits that the then Secretary of Agriculture, after due investigation, notice and hearing to, among others, this defendant, did, on or about December 2, 1940, promulgate and cause to be thereafter duly published in the Federal Register the matter quoted in Paragraph XIV of said complaint commencing at page 11 thereof, line 23 and ending at page 12 thereof, line 19; and that the same was not subsequently appealed from, modified, abrogated or withdrawn.

(k) Admits the allegations contained in Paragraphs XV, XVI and XVII; and admits that plaintiffs have demanded and defendant has not furnished the information referred to in Paragraph XIII of said count.

(l) Admits and alleges that payments made to plaintiffs or either of them for the crop years 1939, 1940 and 1941 were made in manner and form as

provided in, respectively, Exhibits B, C and D annexed to said complaint.

(m) Alleges that the net sales return secured from sugar sold by defendant from its Clarksburg, California, factory, as compared with the average secured by all manufacturers of sugar north of the 36th parallel for the crop years 1939, 1940 and 1941, per 100 pounds, were as follows:

	Clarksburg	Average
1939	\$3.123	\$3.131
1940	3.163	3.160
1941	3.970	3.950

Defendant further alleges in this connection that it does not [102] know, and that it never has known, the individual net returns from sugar sales by the two manufacturers of beet sugar, other than itself, and having factories north of the 36th parallel.

(n) Admits that plaintiffs have employed the services of attorneys at law for the purpose of bringing this action.

Sixth Defense—Answer to Second Count (Mandeville)

6. Denies each and every allegation contained in said second count, except the following:

(a) It refers to subparagraphs (a) and (n) of Paragraph 5 hereof and incorporates the same and each of them herein by reference as though herein set forth in full.

(b) Admits that defendant paid to plaintiff Mandeville Island Farms, Inc. the sum of \$102,767.13

for 25,430.3 tons of sugar beets of 15.55% average sugar content delivered by said plaintiff to defendant and accepted by defendant from said plaintiff under said standard contract for the 1940 season. Further admits that said payment was based upon sales made during the 1947 season regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Further admits that said plaintiff made written demand upon defendant that it furnish said plaintiff with an accounting showing the average net returns from sugar manufactured from sugar beets produced and delivered during the 1941 season but defendant has not furnished such accounting. In this connection, defendant alleges that it has accounted fully and completely as to said season and as to all seasons herein involved in the manner and form as provided in [103] its said standard form contracts, copies of which are annexed to said complaint herein and marked, respectively, Exhibits B, C and D.

(c) Admits and alleges that the net return for sugar sold during the crop season of 1940 was determined by a certified public accountant, to-wit, Haskins & Sells, chosen by defendant and the other companies maintaining beet sugar factories located in California north of the 36th parallel by deducting from the gross sales price of such sugar all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective companies' established systems of accounting, and showing net returns from sugar sold, after deducting also all ex-

cise, sales and other taxes, if any, imposed by act of law or state or Federal regulation. Said net return was determined, and said deductions were, as follows:

Gross sales, less cash discounts and allowances.....	\$4.455	
Less:		
Federal excise tax.....	\$.535	
Freight on sugar to destination.....	.468	1.003
		<u>\$3.452</u>
Less sales and marketing expenses:		
Insurance on sugar only.....	\$.007	
State taxes, and personal property taxes on sugar	.031	
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses)	.071	
Loading, handling, reconditioning, and additional cost of packing in small packages.....	.071	
Brokerage and commissions.....	.051	
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc. ....	.061	\$.292
		<u>\$3.160</u>
Net return from sales.....		\$3.160

(d) Admits that the sum of \$102,767.13 paid by defendant to plaintiff Mandeville Island Farms, Inc. for sugar beets purchased during the crop year 1940 was based upon 25,430.3 tons of beets of an average sugar content of 15.55% and upon an averaged net return per 100 pounds of sugar of \$3.160; and that in arriving at said sum of \$102,767.13 defendant took an intermediate value of beets of the above sugar content of \$4.04.

(e) Admits that defendant calculated the amount to be paid plaintiff Mandeville Island Farms, Inc. for the 1940 crop upon the schedule set forth in the

standard form contract (Exhibit C annexed to said complaint and not upon the schedule or schedules set forth in Paragraph XIV of said complaint.

Seventh Defense—Answer to Third
Count (Zuckerman)

7. Denies each and every allegation contained in said third count, except the following:

(a) It refers to subparagraphs (a) and (n) of Paragraph 5 hereof and incorporates the same and each of them herein [105] by reference as though herein set forth in full.

(b) Admits that defendant paid to plaintiff Zuckerman the sum of \$74,794.76 for 14,144.7 tons of sugar beets of 15.47% average sugar content delivered by said plaintiff to defendant and accepted by defendant from said plaintiff under said standard contract for the 1941 season. Further admits that said payment was based upon sales made during the 1941 season regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Further admits that said plaintiff made written demand upon defendant that it furnish said plaintiff with an accounting showing the average net returns from sugar manufactured from sugar beets produced and delivered during the 1941 season, but defendant has not furnished such accounting. In this connection, defendant alleges that it has accounted fully and completely as to said season and as to all seasons herein involved in the manner and form as provided in its said standard form contracts, copies of which are annexed to said com-

plaint herein and marked, respectively, Exhibits B, C and D.

(c) Admits and alleges that the net return for sugar sold during the crop season of 1941 was determined by a certified public accountant, to wit, Haskins & Sells, chosen by defendant and the other companies maintaining beet sugar factories located in California north of the 36th parallel by deducting from the gross sales price of such sugar all such charges and expenditures as are regularly and customarily deducted from gross sale price of sugar, in accordance with the respective companies' established systems of accounting, and showing net returns from sugar sold, after deducting also all excise, sales and other taxes, if any, [106] imposed by act of law or state or Federal regulation. Said net return was determined, and said deductions were, as follows:

Gross sales, less cash discounts and allowances.....	\$5.132		
Less:			
Federal excise tax.....	\$.535		
Freight on sugar to destination.....	.352	.887	\$4.245
		<hr/>	
Less sales and marketing expenses:			
Insurance on sugar only.....	\$.007		
State taxes, and personal property taxes on sugar	.040		
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses)	.056		
Loading, handling, reconditioning, and additional cost of packing in small packages.....	.077		
Brokerage and commissions.....	.042		
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc.	.073	.295	
		<hr/>	
Net return from sales.....			\$3.950

(d) Admits that the sum of \$74,794.76 paid by defendant to plaintiff Zuckerman for sugar beets purchased from the latter during the crop year 1941 was based upon 14,144.7 tons of beets of an average sugar content of 15.47% and upon an averaged [107] net return per 100 pounds of sugar of \$3.950; and that in arriving at said sum of \$74,794.76 defendant took an intermediate value of beets of the above sugar content of \$5.29.

(e) Admits that defendant calculated the amount to be paid plaintiff Zuckerman for the 1941 crop upon the schedule set forth in the standard form contract (Exhibit D annexed to said complaint) and not upon the schedule or schedules set forth in Paragraph XIV of said complaint.

Eighth Defense—Mandeville, 1939

8. On or about August 31, 1940, an account in writing was stated by and between defendant and plaintiff Mandeville Island Farms, Inc. wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1939 and paid to said defendant for said beets the sum of \$107,262.18, being the sum found and stated to be due in and by such accounting. Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Ninth Defense—Mandeville, 1940

9. On or about August 31, 1941, an account in writing was stated by and between defendant and

plaintiff Mandeville Island Farms, Inc. wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1940 and paid to said defendant for said beets the sum of \$102,767.13, being the sum found and stated to be due in and by such accounting. [108] Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Tenth Defense—Zuckerman, 1941

10. On or about August 31, 1942, an account in writing was stated by and between defendant and plaintiff Zuckerman wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1941 and paid to said defendant for said beets the sum of \$74,794.76, being the sum found and stated to be due in and by such accounting. Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Eleventh Defense—Mandeville

11. Plaintiff Mandeville Island Farms, Inc. entered into, executed and performed each of those certain standard form contracts with defendant, specimen copies of which are annexed to said complaint and marked Exhibits B and C, respectively, of its own free will and volition and with full knowledge of each and all of the terms and contents of said contracts and each of them.

Twelfth Defense—Zuckerman

12. Plaintiff Zuckerman entered into, executed and performed that certain standard form contract with defendant, specimen copy of which is annexed to said complaint and marked Exhibit D, of his own free will and volition and with full knowledge of each [109] and all of the terms and contents of said contract.

Thirteen Defense

13. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than four years prior to the date of the commencement of this action are barred (a) by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of California or (b) by the provisions of Section 343 of said Code.

Fourteenth Defense

14. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than three years prior to the date of the commencement of this action are barred (a) by the provisions of subdivision 1 of Section 338 of the Code of Civil Procedure of California or (b) by the provisions of subdivision 4 of said Section 338 of said Code.

Fifteenth Defense

15. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than two years prior to the date of the commencement of this action are barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of California. [110]

Sixteenth Defense

16. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than one year prior to the date of the commencement of this action are barred by the provisions of subdivision 1 of Section 340 of the Code of Civil Procedure of California.

Wherefore, this defendant prays that plaintiffs, and each of them, take nothing by their said complaint herein.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 12, 1948. [111]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO FIRST AMENDED
COMPLAINT

Now comes plaintiffs, and leave of Court having first been obtained, amend their first amended complaint herein as follows:

I.

Amend paragraph XVIII to read as follows:

A. That portion of California north of the 36th parallel is, in this paragraph, referred to as "northern California." That portion of California south of the 36th parallel is herein referred to as "southern California."

B. The general method of paying for sugar beets in the United States was at all times herein involved a method commonly known and referred to by growers and manufacturers and by Government officials in the beet sugar industry as "the 50-50 method." Under this method the grower received 50% of the sales price of the sugar and sugar by-products manufactured by the manufacturer from the sugar beets and the manufacturer received the other 50%. The fair market price of beets during the cropping seasons herein involved in the United States was at least that price which would pay to the grower one half of the amount received by the manufacturer of the sugar from the beets of that grower for the sugar and sugar by-products produced from said beets by the manufacturer. In such a pricing, the grower was en-

titled to receive at least one half of the amount so received by the manufacturer, regardless of when the sugar produced from said beets was sold and regardless of whether the sugar produced from beets delivered in one crop year was sold in that crop year or at or during the next crop year, and if the sugar produced from beets in one crop year was sold in the next crop year at a higher price, then the grower was entitled to receive at least one-half of the said higher price.

C. Plaintiff is informed and believes and upon such information and belief alleges that the conspiracy above referred to was a part of a conspiracy to restrain interstate commerce in the sugar beets entered into by defendant and all other sugar beet manufacturers with plants in California and with other sugar beet manufacturers with plants in various parts of the United States outside of California whereby the manufacturers of sugar from sugar beets in various beet-producing areas of the United States (of which northern California was one and southern California was another) agreed between themselves that in each area the said manufacturers would fix the price to be paid the growers in each area and would pay such growers only a price determined by the average return of all manufacturers of sugar from sugar beets in each area; as a part of said general conspiracy, the above conspiracy as to northern California was entered into; as part of said general conspiracy, defendant and all manufacturers of sugar beets in southern California adopted and used during said cropping seasons a

method of paying growers based only on the average returns of all [114] manufacturers of sugar beets in said area; and as part of said general conspiracy defendant, in various other beet producing areas outside of California (unknown to plaintiff but particularly within defendant's knowledge) made payments to the growers therein during said periods, based solely on a price determined by the average return of sugar sales of all manufacturers in each of said areas.

D. Certain of the beets produced by plaintiffs, as aforesaid, and delivered to defendant, were by defendant shipped to defendant's sugar factory in southern California, located at Oxnard, where said beets were manufactured into sugar by defendant. The amount of beets so shipped is particularly within the knowledge of defendant. Said beets, when they reached the said southern California factory of defendant at Oxnard, were mingled with beets raised by various southern California growers and manufactured into sugar and it was, and at all times it has been, impossible to differentiate the sugar manufactured from plaintiffs' beets from that manufactured from beets grown in southern California.

E. During the crop years 1939, 1940 and 1941, there were four manufacturers that operated sugar beet refineries in southern California. Defendant is one of these four. Plaintiffs are informed and believe and upon such information and belief allege that said four manufacturers, including defendant, had, as a part of the general conspiracy above re-

ferred to, entered into a conspiracy in restraint of trade covering southern California, in the same manner as plaintiffs and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the manufacture thereof into sugar in northern California. Plaintiffs are informed and believe and upon such information and belief allege that during said cropping years, said defendants and the other three manufacturers of sugar beets in southern California had, pursuant to said conspiracy, fixed and agreed upon [115] prices to be paid growers of sugar beets manufactured into sugar in their various southern California factories, which said price was the price determined upon the average net returns from the sale of the sugar of all the sugar manufacturers having factories in southern California, regardless of the return of any individual manufacturer.

F. Plaintiffs are informed and believe and upon such information and belief allege that in determining the average net price to be paid growers of sugar beets grown in northern California, the accountants who determined the same, pursuant to said growers' contracts, hereinabove referred to, did not include therein the returns from the sugar produced from beets grown in northern California and delivered to defendant by plaintiffs and other growers in the 1939, 1940 and 1941 cropping seasons but manufactured into sugar at the Oxnard plant of defendant. Plaintiffs are informed and believe and upon such information and belief allege that plaintiffs

and the other growers of sugar beets in California north of the 36th parallel, whose beets were delivered to defendant but were manufactured by defendant into sugar at its Oxnard plant, received no portion of the sales return from the sugar produced from said beets. Plaintiffs are informed and believe and upon such information and belief allege that in determining the average net returns paid growers of sugar beets raised in southern California during the cropping years 1939, 1940 and 1941, the accountants who determined the same included therein the returns from sugar produced by defendant in southern California from beets grown in northern California by plaintiff and other growers and delivered to defendant. Plaintiffs are informed and believe and upon such information and belief allege that the prices paid growers of sugar beets in southern California during said cropping years were determined by defendant and other manufacturers of sugar from sugar beets in [116] southern California by using the average net return secured by the southern California manufacturers of sugar from sugar beets, including defendant, from the sale of sugar produced at the southern California plants of said manufacturers, including defendant, from sugar beets refined at said southern California plants, regardless of where said sugar beets were produced, including sugar beets produced in northern California by plaintiff and other growers of sugar beets in northern California and shipped by defendant to its southern California plant.

G. Plaintiffs are informed and believe and upon such information and belief allege that the average net return from sugar manufactured in southern California during the cropping years 1939, 1940 and 1941 were greater than the average net return from sugar manufactured during the same cropping years in northern California; that as a result of the method of accounting used by defendant and the accountants who determined the average net return in northern California and the accountants who determined the average net return in southern California, defendant and its co-conspirators as a part of said conspiracy during said cropping years, kept for themselves and did not turn over to plaintiffs and the other growers any portion of the proceeds secured from the sugar beets of plaintiffs and other growers in northern California whose beets were manufactured into sugar in southern California.

H. Defendant paid plaintiffs certain sums for the 1939, 1940 and 1941 crops of sugar beets raised by plaintiffs but in carrying out said conspiracy and as a part and parcel thereof,

(a) defendant did not pay plaintiffs the reasonable value of the sugar beets delivered by plaintiffs to defendant;

(b) defendant did not pay plaintiffs upon the basis of the price secured from sugar manufactured from the beets delivered by plaintiffs and other growers located north of the 36th parallel to defendant; [117]

(c) defendant did not pay plaintiffs a price based upon the net return from sugar manufactured by defendant from the beets delivered to defendant by plaintiffs and other growers of sugar beets in northern California;

(d) defendant did not pay plaintiffs at least the minimum price determined by the Secretary of Agriculture as aforesaid;

(e) defendant paid plaintiffs by taking the average net return from sugar sold during the respective crop years by the defendant and the other two manufacturers who had sugar factories in northern California, and not including therein any return from sugar sold subsequent to said crop years from sugar manufactured during said crop years from beets produced during the said crop years and not including therein the return from sugar manufactured in southern California from sugar beets grown and delivered to defendant during said respective crop years in northern California;

(f) defendant did not pay plaintiffs or other growers in northern California for their beets shipped to Oxnard the prices paid other growers whose beets were also processed at Oxnard but were raised in southern California.

I. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, and if plaintiffs had received the reasonable value of their sugar beets in a market

unfettered and unhampered by said plan and conspiracy, plaintiffs are informed and believe and upon such information and belief allege that Mandeville Island Farms, Inc. would have received \$350,000.00 more and plaintiff Roscoe C. Zuckerman would have received at least \$100,000.00 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damages have been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting whereby [118] defendant accounts to plaintiffs for one-half the net return secured from the sugar manufactured from the sugar beets produced by plaintiffs during said cropping years, regardless of where the beets were manufactured into sugar and regardless of whether the sugar produced from said sugar beets was sold during or subsequent to the crop year in which said sugar beets were grown, and whereby defendant accounts to plaintiff for not less than the price fixed by the Secretary of Agriculture as minimum and whereby defendants accounts to plaintiff for the price paid growers of sugar beets in northern California, southern California or the nearest market for sugar beets, free from any agreements in restraint of trade in which defendant is or was a party, whichever one was highest. Defendant has refused all requests and demands of plaintiffs for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled, by virtue of paragraph 15 of the Anti-Trust

Laws of the United States (15 U.S.C., Sec. 15) to have such damaged trebled.

II.

Amend paragraph IX by striking out the last sentence reading: "The reasonable price for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof" and substitute the following:

"The reasonable prices for sugar beets for the crop years here involved were, as plaintiffs are informed and believe, and therefore allege, \$350,000.00 more than Mandeville Island Farms, Inc. received and \$100,000.00 more than Roscoe C. Zuckerman received for said years."

III.

Amend paragraph 4 of the prayer by striking out the figures "\$315,043.80" and substituting for it "\$1,050,000.00" and amend paragraph 5 of the prayer by striking out the figures "\$112,192.14" and [119] substituting for it the figures "\$300,000.00."

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 24, 1949. [119]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO "AMENDMENT TO FIRST
AMENDED COMPLAINT"

Now come plaintiffs, and, leave of Court first having been obtained, amend the "Amendment to First Amended Complaint" filed herein February 24, 1949, to correct a typographical error, as follows:

1. Strike out the word "plaintiffs" in line 26, page 3, in that clause in subparagraph "E" of amended paragraph XVIII which now reads "in the same manner as plaintiffs and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the manufacture thereof into sugar in northern California" and substitute therefor the word "defendant", so that that clause will read "in the same manner as defendant and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the [122] manufacture thereof into sugar in northern California".

Dated: March 1, 1949.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed March 1, 1949. [123]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO ANSWER TO FIRST
AMENDED COMPLAINT, AS
AMENDED

Now Comes defendant American Crystal Sugar Company, a corporation, and after consent of plaintiffs, and each of them, first had and obtained, for amendment to its answer to the first amended complaint, as amended, alleges as follows:

Fifth Defense—Answer to First Count

5.

* * * * *

(g) Admits that this defendant had sugar beet seeds available during said period for growers who contracted with it under form contracts of the type referred to in the next succeeding subparagraph (h) of this Paragraph 5; admits that [125] it is its understanding that the other manufacturers referred to in Paragraph VI of said first count likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources, except to the extent that it is informed and believes and therefore alleges that Union Sugar Company, which said company has its principal office in San Francisco, California, sold seeds during the period from 1938 to 1942, or at least during some portions of said period, to sugar beet growers in California north of the 36th parallel.

* * * * *

(i) Admits the allegations contained in Paragraph X, except the following: Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth on page 9 of the amended complaint, commencing at line 8 with the phrase "while, at the same" and ending at line 19 of said page.

* * * * *

(l) Admits the allegations contained in subparagraph A of Paragraph XVIII.

(m) Admits the allegations contained in subparagraph D of Paragraph XVIII, except the following: Alleges that although it does know the tonnage, at the point of delivery, of the beets produced by plaintiffs, and each of them, and delivered to it which were subsequently shipped to its refinery in southern California located at Oxnard, it does not know the tonnage of plaintiffs' beets so shipped at the point of commencement of shipment to said refinery at said Oxnard.

(n) Answering the allegations of subparagraph E of Paragraph XVIII, alleges that during the crop years 1939, 1940, [126] and 1941 there were three manufacturers who operated sugar beet factories in southern California, to wit, Holly Sugar Corporation, Union Sugar Company, and defendant. Attached hereto, marked Exhibits 1 to 19, inclusive, respectively, and made a part hereof are copies of the contracts in force during said crop years between said manufacturers and the growers in said area.

(o) Admits the allegations contained in subpara-

graph F of Paragraph XVIII, except the following: Denies the allegations set forth on page 4 of the amendment to first amended complaint commencing at line 15 with the phrase "Plaintiffs are informed and" and ending at line 20 of said page.

(p) Answering the allegations of subparagraph G of Paragraph XVIII, admits and alleges that the average joint net return from sugar manufactured in southern California during the cropping years 1939, 1940 and 1941 was greater than the average joint net return from sugar manufactured during the same cropping years in northern California.

(q) Answering the allegations of subsections (b), (c) and (d) of subparagraph H of Paragraph XVIII, admits and alleges that payments made to plaintiffs, or either of them, for the crop years 1939, 1940 and 1941 were made in manner and form as provided in, respectively, Exhibits B, C and D annexed to the amended complaint. Admits the allegations contained in subsections (e) and (f) of subparagraph H of Paragraph XVIII.

Sixth Defense—Answer to Second Count
(Mandeville)

6.

* * * * *

(b) Admits that defendant paid to plaintiff Mandeville [127] Island Farms, Inc. the sum of \$102,-767.13 for 25,430.3 tons of sugar beets of 15.55% average sugar content delivered by said plaintiff to defendant and accepted by defendant from said plaintiff under said standard contract for the 1940 season. Further admits that said payment was based

upon sales made during the 1940 season regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Further admits that said plaintiff made written demand upon defendant that it furnish said plaintiff with an accounting showing the average net returns from sugar manufactured from sugar beets produced and delivered during the 1940 season but defendant has not furnished such accounting. In this connection, defendant alleges that it has accounted fully and completely as to said season and as to all seasons herein involved in the manner and form as provided in its said standard form contracts, copies of which are annexed to said complaint herein and marked, respectively, Exhibits B, C and D.

* * * * *

Seventh Defense—Answer to Third Count
(Zuckerman)

7.

(a) It refers to subparagraphs (a) through (q) of Paragraph 5 of its answer and of this amendment thereto and incorporates the same, and each of them, herein by reference as though herein set forth in full.

O'MELVENY & MYERS,
PIERCE WORKS, and
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed March 16, 1949. [128]

[Title of District Court and Cause No. 4643.]

NOTICE OF MOTION OF PLAINTIFFS TO
STRIKE PORTIONS OF PLAINTIFFS'
COMPLAINT AS AMENDED

To the Defendant and Its Attorney:

Take Notice that on Monday, January 9, 1940, at 2:00 p.m., in court room No. 6 of the U. S. Court House and Post Office Building, Los Angeles, California, plaintiffs will move the above entitled court for leave to strike from plaintiffs' amended complaint as amended, that portion of subpar. (b) of par. XIV found on page 12, lines 22 to 24 of "Amended Complaint", reading as follows:

"The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination."

Said motion will be based on the ground that by "Amendment to First Amended Complaint" filed February 24, 1949, similar words were stricken from par. IX and through an oversight they were not stricken from par. XIV and as a result the complaint as amended contains an inconsistency.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

Duly certified.

Acknowledgment of Service attached.

[Endorsed]: Filed December 27, 1949. [155]

In the District Court of the United States for the
Southern District of California, Central Division

No. 8353-WM

G. K. EVANS,

Plaintiff,

vs.

AMERICAN CRYSTAL SUGAR COMPANY,
a corporation,

Defendant,

COMPLAINT

Action For Accounting, Damages Under the
Anti-Trust Laws, Etc.

Now comes plaintiff above named and for cause
of action alleges:

I.

The grounds upon which the jurisdiction of the court depends are: (a) Diversity of citizenship; (b) this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States (15 U.S.C. Sec. 15), and brought in a district in which the defendant is found and has an agent.

II.

(a) Plaintiff now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

(b) Defendant American Crystal Sugar Company now is and [205] at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California.

III.

(a) Camps 5, 6 and 7 of American Island, Contra Costa County, California, at times herein mentioned were areas of land suitable in composition, drainage, irrigation, location, climate and transportation facilities for the successful raising of sugar beets suitable for processing into sugar. At all times herein mentioned plaintiff had supplies, equipment, tools, personnel, labor, organization and knowledge adequate for the successful raising on said areas of sugar beets suitable for processing into raw sugar.

(b) A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences.

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

On September 11, 1939, the second world war broke out and thereafter and up to December 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defenses against its possible entry into said conflict. On December 7, 1941 the Japanese attacked the United States at Pearl Harbor. This [206] was followed by declaration of war between the United States and all the members of the Axis. At all times from September 11, 1939, the sugar beet industry was and now is one of the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continues. The various steps involved in the production and protection of beet sugar, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now are inextricably intermingled with and directly affected by each other and have an immediate relation on each other. Each

of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was completed when the sugar was used by the ultimate consumer.

VI.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including that portion of California north of the 36th parallel, Utah, Colorado, Michigan, Idaho, Illinois, Arizona and other states were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were [207] bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the

three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers.

(c) The sugar manufactured from said sugar beets was, during all of said period, sold in interstate commerce throughout the United States.

(d) After the raw sugar had been produced, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States.

(e) During said period above referred to, the only

sugar [208] beet seeds available in said portion of California were those securable from one of said three manufacturers and the only method of sale of marketable sugar beets used by growers of sugar beets in said area of California was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets.

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar

beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net [209] return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined under the contracts by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. But during the crop seasons of 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were de-

livered and by whom the beets were manufactured into raw sugar.

IX.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States, and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as [210], to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to-wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other

manufacturers of sugar north of the 36th parallel as to efficiency of sales or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the growers of sugar beets a reasonable price for their beets, each of said conspirators furnished seeds to, entered into contracts with and bought seeds only from growers who signed a standard printed form of contract prepared by said manufacturers, which contained the provision that the net return used as the basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California. Farmers contemplating or desirous of growing sugar beets either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a market to sell their marketable beets except for hog or cattle feed at a large loss. Attached hereto and marked Exhibits "B", "C" and "D", respectively, are the said standard printed form contracts [211] for the crop years 1939, 1940 and 1941.

(e) Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiff and other sugar beet growers in California north of the 36th parallel and set forth in

said Exhibits "B", "C" and "D" are not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.

(f) Each agreed not to enter into contracts with any grower who, prior to the crop year 1939, had dealt with any of the other refineries as to beets grown by said grower in land situated in California north of the 36th parallel and each agreed that each of them would retain the growers who had dealt with that company prior to the crop year 1939.

(g) Each would sell its sugar upon the multiple base point system of sales with San Francisco, California, New York City, N. Y., and New Orleans, Louisiana as the base points and with "phantom freight" included in and "freight absorption" taken from the delivered products.

X.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destina-

tion, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, [212] at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .265 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel who had contracted with defendant received on the average from 291½ cents to 521½ cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of identical beets of identical sugar content delivered to the other manufacturers of beet sugar in California north of the 36th parallel.

XI.

During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer any such competition between the conspirators. Plaintiffs are informed and believe and upon such information and belief allege that defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed, and did not and refused to and did not

sign any contracts with or do business with any grower who, during the crop season of 1938, had dealt with one of the other conspirators. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XII.

As a direct, expected and planned result of said conspiracy, [213] the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar

beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring.

XIII.

Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method agreed upon in said conspiracy as above set forth, and will not furnish any of the growers the individual, as contrasted with the pooled, sales return of the particular manufacturer with whom said grower dealt. Plaintiff herein demanded in writing such information of defendant but defendant refused to and has not furnished the same. [214]

XIV.

(a) Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and were used in the Sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agricul-

ture in accordance with Sec. 301 of the said Sugar Act. (7 U.S.C. 1131). Claude R. Wickard was at all times mentioned in this paragraph the duly appointed, qualified and acting Secretary of Agriculture. On December 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to Section 301d of said Sugar Act (7 U.S.C. 1131 (d)) make the following determination of the fair and reasonable price for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231):

“Fair and reasonable prices for the 1940 and 1941 crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule:

Percentum sucrose in beets		Average net return of sugar 100 lbs. of sugar			
.....	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00
		Price per ton of sugar beets			
19.....	7.12	\$6.65	\$6.18	\$5.70	\$5.22
18	6.66	6.21	5.76	5.31	4.86
17	6.20	5.78	5.36	4.93	4.50
16	5.76	5.36	4.96	4.56	4.16
15	5.32	4.95	4.58	4.20	3.82
14	4.90	4.55	4.20	3.85	3.50

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content,

higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however, that in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, that a haulage allowance at a rate not less than $2\frac{1}{2}$ cents per mile per ton shall be granted to growers who perform such service in areas in which allowances have been agreed upon between producer-processors and growers.”

(b) No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or withdrawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination.

(c) The said determination of the Secretary of Agriculture under the Sugar Act of 1937 as to the fair and reasonable prices for the 1940 and 1941 California crops of sugar beets was made December 21, 1940, and was published in the said register on December 24, 1940, as aforesaid, but, nevertheless, defendant and its said co-conspirators, each of whom took part in the said hearings held by the Secretary of Agriculture, and each of whom well knew of the determination, persisted thereafter in their said conspiracy and would not buy beets from growers in California north of the 36th parallel except under

the terms and conditions set forth in said standard agreement.

XV.

Plaintiff and defendant on November 11, 1938, on December 11, 1939, and on December 23, 1940 entered into defendant's standard form contracts for the 1939, 1940 and 1941 crop season. Attached [216] hereto and marked Exhibits "B", "C" and "D" are copies of said respective contracts. Plaintiff performed each and every term, condition and covenant on his part to be performed in said contracts and delivered to defendant 4,517.1 tons of beets yielding 18.4% sugar under the 1939 contract, 3,698.1 tons of beets yielding 18.07% sugar under the 1940 contract and 4,401.7 tons of beets yielding 17.53% sugar under the 1941 contract, which beets were accepted by defendant and manufactured by it into sugar. Plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said manufacture is particularly within the knowledge of defendant.

XVI.

Said contracts Exhibits "B", "C" and "D" and the contracts theretofore entered into between sugar beet growers and refiners of sugar beets in California north of the 36th parallel, were drawn with the understanding that one-half of the net amount received for the sugar was to go to the grower and one-half to the refiner and the formulas set forth in said contracts and in the determination of reasonable prices by the Secretary of Agriculture hereinabove re-

ferred to, were prepared with the purpose and intent, as defendant well knew, of providing a mathematical formula that would so divide the net proceeds of the sugar.

XVII.

Defendant paid plaintiff for his 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiff on said respective dates, not upon the price secured in interstate commerce from sugar manufactured from beets delivered by plaintiff and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel, as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases determined [217] by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce for sugar by all manufacturers of beet sugar with refineries in California north of the 36th parallel and in accordance with the schedule set forth in the said standard contracts. Plaintiff is informed and believes and upon such information and belief alleges that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel. Plaintiff is informed and believes and upon such information and belief alleges that defendant retained and did not sell large quantities of the sugar manufactured in the cropping seasons 1939, 1940 and

1941 and from beets grown in California north of the 36th parallel by plaintiff and other growers and delivered to defendant, but retained the same beyond the respective crop years and sold the same subsequent to the close of the crop year 1941 at a higher gross and higher net price than the sugar sold during the respective crop years 1939, 1940 and 1941, but that defendant did not account to nor pay to plaintiff any part or portion of the higher prices so secured but retained and kept all of said higher prices, despite the fact that under the understanding and agreement between the parties and under the fundamental basis upon which the formulas were prepared, plaintiff was entitled to receive one-half of the said net interest. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff would have received at least \$50,000.00 more than he did receive under said contracts and said plaintiff sustained damages accordingly, no part of which has been paid. The exact amount that plaintiff was damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiff for information on which plaintiff could [218] determine and could herein plead the specific amounts due to plaintiff. Plaintiff is entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XVIII

By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiff as aforesaid.

XIX.

Plaintiff, in order to enforce his rights against defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), is entitled to reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys.

XX.

From October 10, 1942, to June 30, 1946, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942, as amended June 30, 1945 (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781; 59 Stat. 306; U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1947 Cum. An. P. P. Title 15, Sec. 16, p. 125), which was in full force and effect between October 10, 1942, and June 30, 1946.

Wherefore, plaintiff prays judgment against defendant as follows:

1. That defendant be required to account to plaintiff in connection with all sugar beets delivered by plaintiff to defendant [219] during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.

2. That plaintiff have judgment for the sum found to be due him by said accounting and that the amount so found due be trebled.

3. That plaintiff have judgment against defendant for \$75,000.00, with interest from August 31, 1941, together with attorney fees in such amount as the court may deem reasonable.

4. That plaintiff have judgment for his costs herein involved and attorney fees.

5. That plaintiff have judgment for such other and further relief as may be fit and proper in the premises.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

Complaint amended: March 2, 1949.

[Endorsed]: Filed June 23, 1948. [220]

[Title of District Court and Cause No. 8353.]

NOTICE OF MOTIONS TO DISMISS AND TO
STRIKE FROM COMPLAINT

To Plaintiff in the Above Entitled Action and to
Messrs. Wood, Crump, Rogers, Arndt & Evans,
His Attorneys of Record:

Please Take Notice that defendant above named will, on Monday, September 20, 1948, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, move the above entitled Court, in Court Room No. 2 thereof, in the United States Post Office and Court House Building, Los Angeles, California, the Honorable William C. Mathes, Judge presiding, as follows:

1. To dismiss the action to the extent that it asserts [227] claims for damages arising out of alleged underpayments for sugar beets delivered by plaintiff to defendant under contracts between said parties for the crop years 1939 and 1940, upon the ground that the action, to said extent, accrued prior to October 3, 1941, and is therefore barred by the provisions of Section 338 (1) of the California Code of Civil Procedure.

2. To strike from the complaint the following parts or portions thereof:

(a) The following portion of Paragraph IX, appearing at page 8, lines 6 to 9:

“The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.”

(b) The whole of Paragraph XIV, appearing at pages 11 to 12.

(c) The following portion of Paragraph XVI, appearing at page 13, lines 18 to 20:

“and in the determination of reasonable prices by the Secretary of Agriculture hereinabove referred to.”

(d) The following portion of Paragraph XVII, appearing at page 13, line 32 to page 14, line 2:

“and not upon the prices and the bases determined by the Secretary of Agriculture to be fair and reasonable as aforesaid;”

Said motion will be made upon the ground that the portions of the complaint moved to be stricken are immaterial.

3. To strike from the complaint the following parts or portions thereof: [228]

(a) The following portions of Paragraph XVI:

(1) Appearing at page 13, lines 13 to 18:

“Said contracts Exhibits ‘B’, ‘C’ and ‘D’ and the contracts theretofore entered into between the sugar beet growers and refiners of sugar beets in California north of the 36th parallel, were drawn with the understanding that one-half of the net amount received for the sugar was to go to the grower and one-half to the refiner and the formulas set forth in said contracts”

(2) Appearing at page 13, lines 20 to 22:

“were prepared with the purpose and intent,

as defendant well knew, of providing a mathematical formula that would so divide the net proceeds of the sugar."

Said motion will be made upon the grounds (a) that to permit proof of the above quoted portions of Paragraph XVI would be a violation of the parol evidence rule, and (b) that said allegations are immaterial.

4. To strike from the complaint the following part or portion thereof, appearing at page 14, lines 9 to 23:

"Plaintiff is informed and believes and upon such information and belief alleges that defendant retained and did not sell large quantities of the sugar manufactured in the cropping season 1939, 1940 and 1941 and from beets grown in California [229] north of the 36th parallel by plaintiff and other growers and delivered to defendant, but retained the same beyond the respective crop years and sold the same subsequent to the close of the crop year 1941 at a higher gross and higher net price than the sugar sold during the respective crop years 1939, 1940 and 1941, but that defendant did not account to nor pay to plaintiff any part or portion of the higher prices so secured but retained and kept all of said higher prices, despite the fact that under the understanding and agreement between the parties and under the fundamental bases upon which the formulas were prepared, plaintiff was entitled to receive one-half of the said net interest."

Said motion will be made upon the ground that the portion of the complaint moved to be stricken is immaterial.

Dated: August 18, 1948.

O'MELVENY & MYERS,
PIERCE WORKS, and
JOHN WHYTE,

/s/ By JOHN WHYTE,
Attorneys for Defendant. [230]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Motion to Dismiss—Statute of Limitations

1. A motion to dismiss may be utilized to raise the bar of the statute of limitations whenever the complaint shows upon its face that the cause of action has not been brought within the statutory period,

Wright v. Bankers Service Corp. (S.D. Cal. 1941) 39 F. Supp. 980, 983-984;

Gossard v. Gossard (C.C.A. 10, 1945), 149 F. (2d) 111, 113;

Berry v. Chrysler Corp. (C.C.A. 6, 1945), 150 F. (2d) 1002, 1003;

Sinclair v. United States Gypsum Co. (W.D. N.Y. 1948), 75 F. Supp. 439, 442;

Statler v. Babcock (W.D. Pa. 1946), 9 Fed. Rules Serv. 86, 87-88;

Wilson v. Shores-Mueller Co. (N.D. Iowa 1941), 40 F. Supp. 729, 731;

even though the defendant seeks to dismiss the action only to the extent that it asserts claims for damages accruing prior to a certain date.

Abram v. San Joaquin Cotton Oil Co. (S.D. Cal. 1942), 46 F. Supp. 969, 971, 974-975.

Grosopian v. Pan American Refining Corp. (S.D. Texas 1947), 6 F.R.D. 453, 454-455.

2. In civil suits for treble damages under the federal anti-trust laws (15 U.S.C.A. Sec. 15), the applicable statute of limitations is that of the state in which the action is brought. [231]

Chattanooga Foundry and Pipe Works v. City of Atlanta (1906), 203 U.S. 390, 397.

Northern Kentucky Tel. Co. v. Southern Bell T. & T. Co. (C.C.A. 6, 1934), 73 F. (2d) 333, 334, cert. denied (1935) 294 U.S. 719.

Bluefields S. S. Co. v. United Fruit Co. (C.C.A. 3, 1917), 243 F. 1, 20, writ of error dismissed (1919) 248 U.S. 595.

Glenn Coal Co. v. Dickinson Fuel Co. (C.C.A. 4, 1934), 72 F. (2d) 885, 890.

3. The applicable statute of limitations in California appears to be the three year period of limitations prescribed by Section 338 (1) of the Code of Civil Procedure for "an action upon a liability created by statute, other than a penalty or forfeiture."

See *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9, 1936), 85 F. (2d) 742, 750-753, cert. denied (1937) 299 U.S. 613.

Cf. *Hansen Packing Co. v. Swift & Co.* (S.D.

N.Y. 1939), 27 F. Supp. 364 (action for treble damages under federal anti-trust laws is "a liability created by statute" and falls within the Montana statute of limitations requiring that "an action upon a liability created by statute, other than a penalty or forfeiture" be brought within two years).

Cf. *Momand v. Universal Film Exchange* (D.C. Mass. 1942), 43 F. Supp. 996 (action for treble damages under Section 4 of the Clayton Act governed [232] by Oklahoma statute prescribing a three year period of limitations for an action upon a "liability created by statute" other than a "penalty" or "forfeiture").

4. The complaint was filed on June 23, 1948. Therefore, assuming, without in any way conceding, that the Acts of Congress referred to in Paragraph XX thereof as suspending the statutes of limitations relating to violations of the anti-trust laws from October 10, 1942, to June 30, 1946, are applicable to private actions for treble damages thereunder, the three year period of limitations provided for in Section 338 (1) of the California Code of Civil Procedure would commence to run on October 3, 1941, and Plaintiff's cause of action would be barred to the extent that it accrued prior to that date.

5. In a civil action for damages allegedly sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom; hence,

the cause of action arises when the damage occurs and the statute of limitations begins to run at that time.

Foster & Kleiser Co. v. Special Site Sign Co.
(supra) at pages 750-751.

Bluefields S. S. Co. v. United Fruit Co. (supra)
at page 20.

Momand v. Paramount Pictures Distributing
Co. (D.C. Mass. 1941), 36 F. Supp. 568, 570.

6. The gist of the action set forth in the complaint [233] is to recover damages arising out of alleged underpayments for sugar beets delivered by plaintiff grower to defendant processor during the crop years 1939, 1940 and 1941 under the defendant's standard form contracts separately covering each of said crop years. (Complaint, Pars. XV and XVII.) A crop year commences on August 1st of any particular year and continues until July 31st of the succeeding calendar year. (Complaint, Par. III.) Thus, the crop year 1939, for example, began on August 1, 1939, and ended on July 31, 1940.

Copies of the above mentioned contracts for the crop years 1939, 1940 and 1941 are attached to the complaint as Exhibits "B", "C" and "D", respectively. Each of them provides in Paragraph 5 thereof for partial monthly settlements for beets delivered by the grower during the preceding month and for final settlement for all beets delivered under the contract not later than August 31st of the following calendar year. Consequently, under the terms of said contracts, plaintiff was unable to ascertain with certainty whether or not he had been damaged,

i.e., under paid, for one or more of the crop years 1939, 1940 or 1941, until the final settlement for beets delivered during each of said years had been made on August 31, 1940, August 31, 1941, and August 31, 1942, respectively. For this reason, in so far as plaintiff is asserting any claims for damages resulting from an alleged underpayment for beets delivered by him to defendant under the 1939 and 1940 crop year contracts, to this extent his cause of action accrued partly on August 31, 1940, and partly on August 31, 1941, or prior to the cut-off date of October 3, 1941, and is therefore barred by the statute of limitations. [234]

7. In this connection see particularly

Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co. (W.D. Ky. 1941), 37 F. Supp. 728:

“This action is not based upon the making of the contracts. It is based upon commissions paid to Fitch upon coal purchased by the plaintiff from the Coal Company. The payment of the commission is the gist of the action. The pre-existing contracts may be the basis for the purchase by the plaintiff of coal from the Coal Company as it becomes necessary for such coal to be purchased, but it is the actual purchase of the coal at a definite price and the payment of the commission to the buyer’s agent upon that purchase that creates the liability.” (at p. 736)

* * * * *

“Defendants also contend that the action should be dismissed because it is barred by the

five-year statute of limitations as set out in Section 2515 of Carroll's Kentucky Statutes. This proceeds upon the theory that the cause of action arises out of the alleged inducing and procurement of the execution of the coal purchase contract in March, 1933, which is more than five years before this action was filed. This again fails to recognize the essential nature of the present suit. As stated in the preceding paragraph the cause of action arises out of the payment of commissions subsequent to June 19, 1936, [235] the effective date of the Robinson-Patman Act. Such payments of commissions were not illegal before that time and no cause of action for treble damages by reason thereof existed under the Clayton Act until that date." (at p. 738.)

II. Motion to Strike

A. Determinations of the Secretary of Agriculture.

8. The determination of a reasonable price for sugar beets by the Secretary of Agriculture is merely a condition precedent to his making payments under the Sugar Act.

Plaintiff lays stress upon the determination by the Secretary of Agriculture of a fair and reasonable price for sugar beets under the Sugar Act as being controlling and absolute. Recourse to the Act, however, (7 U.S.C.A. Sec. 1100, et seq., particularly Sec. 1131 and subsec. (c) (2) thereof), reveals that such determination by the Secretary is merely a condition

precedent to the payment by him of benefits to certain producers and processors of sugar beets. Other conditions, for instance, are no child labor, proportionate share production and proper wage standards. Such being the case, we have moved to strike all allegations regarding the Secretary's determination as immaterial, both for the above reason and for the further reason that here we are dealing with duly executed contracts providing their own contract price.

Indeed, if we follow plaintiff's thesis to its logical conclusion, he himself has supplied a further ground of immateriality in this regard. The complaint alleges in Paragraph XIV thereof, on information and belief, that this defendant received payments under the Act. If we assume this statement to be true, [236] plaintiff is met with the provisions of Sec. 306 of the Act (7 U.S.C.A. Sec. 1136), which provide that the facts constituting the basis of any payment made (among which bases are, of course, the determination that the prices paid by the processors were reasonable) shall be reviewable only by the Secretary, and his determinations with respect thereto shall be final and conclusive.

It follows that, on plaintiff's own theory of the case, he may not attack the reasonableness of defendant's prices paid for beets during the years 1939, 1940 and 1941 unless and until he has exhausted such administrative remedies before the Secretary as are reserved to him by the Act.

B. Understanding with which contracts were drawn.

9. To permit proof of the allegations of Paragraph XVI that the contracts between the parties for the crop years 1939, 1940 and 1941 "were drawn with the understanding that one-half of the net amount received for the sugar was to go to the grower and one-half to the refiner" and that "the formulas set forth in said contracts * * * were prepared with the purpose and intent * * * of providing a mathematical formula that would so divide the sugar," when the contracts themselves contain nothing to this effect, would be a flagrant violation of the parol evidence rule.

The execution of a written contract supersedes all the negotiations or stipulations concerning its matters which preceded or accompanied its execution when there is no ambiguity therein and no fraud or mistake is alleged or proved.

California Civil Code, Section 1625.

California Code of Civil Procedure, Section 1856. [237]

Alameda County Title Ins. Co. v. Panella (1933), 218 Cal. 510, 513-514.

San Francisco Milling Co. v. Frye & Co. (1934), 2 Cal. App. (2d) 563, 566.

Thomson v. Langton (1920, 45 Cal. App. 415, 416.

Thoroman v. David (1926), 199 Cal. 386, 389-390.

United Iron Works v. Outer Harbor Dock, etc., Co. (1914), 168 Cal. 81, 84-85.

In any event the fact that the schedules of payment for beets set forth in the contracts were pre-

pared with the intention of dividing the net return received for the sugar equally between the grower and the processor is wholly immaterial.

C. Interpretation of contracts.

10. The question presented by the motion to strike that portion of Paragraph XVII of the complaint appearing at page 14, lines 9 to 23 depends upon a construction of the form contracts between the parties for the crop years 1939, 1940 and 1941, which are attached to the complaint as Exhibits "B", "C" and "D", respectively. The question is this: Was defendant obligated to pay plaintiff for beets purchased by it from plaintiff during a particular crop year upon the basis of the sales of sugar manufactured from those particular beets, or upon the basis of sugar sold during such crop year irrespective of when the beets going to make up such sugar were raised?

11. Defendant was obligated under the contracts involved [238] to pay plaintiff upon the basis of sugar sold during a particular crop year irrespective of when the beets going to make up the same were raised.

In this regard the contracts provide that the price per ton for beets delivered "hereunder" shall be determined upon the average net returns received "for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1" of the crop year involved, and based upon the sugar content, etc. In view of this language,

plaintiff's position that he should be paid on the basis of returns from the sugar manufactured from the beets delivered during the crop years 1939, 1940 and 1941, which said sugar he alleges, on information and belief, was sold after the close of the crop year 1941 at a higher net price than the sugar sold during said three crop years, is clearly untenable. The terms of the contract are plain—the test is average net returns from (a) sugar manufactured at beet sugar factories located in California north of the 36th parallel, (b) and sold during the twelve months' period specified. It is submitted that to hold otherwise would be to rewrite the contract of the parties.

It is therefore respectfully urged that for the reasons hereinabove set forth, the motions presented herewith should be granted.

Respectfully submitted,

O'MELVENY & MYERS,
PIERCE WORKS and
JOHN WHYTE,

/s/ By JOHN WHYTE,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed August 18, 1948. [239]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO COMPLAINT

Now comes plaintiff, and, pursuant to Rule 15-A of the Rules of Civil Procedure, amends his complaint on file herein as a matter of correction, by

adding thereto a new paragraph to be numbered XXI, as follows:

XXI.

During the period that plaintiff farmed the land described in the contracts Exhibits B, C and D, defendant was the owner of said land and the plaintiff was a share tenant or share cropper of defendant, farming said land, and during all of said period, as defendant well knew, plaintiff trusted and relied upon and had implicit confidence in defendant. Defendant owed a duty to plaintiff at all times during said period to disclose to plaintiff the existence of the conspiracy hereinabove set forth but defendant did not do so but concealed the existence of said conspiracy from plaintiff and did not reveal same to plaintiff. Plaintiff knew nothing of said conspiracy [241] until he read a news story in a Stockton, California newspaper on May 10, 1948, reporting, as a news item, the decision of the Supreme Court of the United States in *Mandeville Island Farms, Inc. and R. C. Zuckerman* against defendant herein. The action of said Supreme Court was in a case that arose in this court and which is numbered herein 4643 B.H. Following the reading of said news story, plaintiff caused an investigation to be made and as a result of this investigation this action resulted. At no time prior to May 10, 1948 did it know or suspect said conspiracy and at no time prior to May 10, 1948 did he have any knowledge thereof or did he have any knowledge that he was not paid the amount he would have received had there been no conspiracy. The filing of the action herein was the first demand by

plaintiff for payment of the amount to which he would have been entitled to receive were it not for said conspiracy.

Wherefore, plaintiff prays relief as by complaint sought.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 8, 1948. [242]

[Title of District Court and Cause No. 8353.]

MEMORANDUM

Motion to dismiss the action to the extent that it asserts claims for damages arising out of alleged underpayments for sugar beets delivered by plaintiff to defendant under contracts between said parties for the crop years 1939 and 1940, upon the ground that the action, to said extent, accrued prior to October 3, 1941, is granted.

Motion to strike is denied.

Defendant is granted twenty days to answer.

Dated: This 22nd day of November, 1948.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed Nov. 22, 1948. [244]

[Title of District Court and Cause No. 8353.]

ANSWER

Defendant for answer to the complaint herein and to the claim or claims therein set forth and not heretofore dismissed by the above entitled Court, admits, denies and alleges as follows:

First Defense

1. Alleges that said complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Denies each and every allegation contained in said complaint, except the following: [245]

(a) Admits diversity of citizenship as between plaintiff and defendants and each of them and that said action is brought under the antitrust laws against a defendant found within the Southern District of California and having an agent therein.

(b) Admits the allegations contained in Paragraphs II, III and IV of said complaint.

(c) Admits the allegations of Paragraph V commencing at line 28 of page 2 of said complaint and ending at line 6 of page 3 thereof. Admits that the United States Government rationed the use of sugar in the United States.

(d) Admits the allegations contained in subparagraph (a) of Paragraph VI.

(e) Admits that the principal market available to sugar beet growers in California north of the 36th parallel during the period 1938-1942 consisted of three sugar manufacturers, of which de-

fendant was one; and alleges that it is without knowledge or information sufficient to form a belief as to whether any of such growers could or could not have sold their beets at a profit to any other manufacturer.

(f) Admits the allegations contained in subparagraphs (c) and (d) of said Paragraph VI.

(g) Admits that this defendant had sugar beet seeds available during said period for growers who contracted with it under form contracts of the type referred to in the next succeeding [246] subparagraph (h) of this Paragraph 5; admits that it is its understanding that the other manufacturers referred to in Paragraph VI of said first count likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources.

(h) Admits the authenticity of the form and contents of that certain contract, a copy of which is annexed to said complaint and marked Exhibit D; and admits and alleges that said contract was in use and was duly executed and duly performed according to its terms during and with relation to the particular crop year, to wit, 1941, specified therein by this defendant and by any and all growers contracting with this defendant during such crop year, including plaintiff herein.

(i) Admits the allegations contained in Paragraph X.

(j) Admits that the then Secretary of Agriculture, after due investigation, notice and hearing to,

among others, this defendant, did, on or about December 2, 1940, promulgate and cause to be thereafter duly published in the Federal Register the matter quoted in Paragraph XIV of said complaint commencing at page 11 thereof, line 19 and ending at page 12 thereof, line 13; and that the same was not subsequently appealed from, modified, abrogated or withdrawn.

(k) Admits the allegations contained in Paragraph XV.

(l) Admits and alleges that payments made to plaintiff [247] for the crop year 1941 were made in manner and form as provided in Exhibit D annexed to said complaint.

(m) Alleges that the net sales return secured from sugar sold by defendant from its Clarksburg, California, factory, as compared with the average secured by all manufacturers of sugar north of the 36th parallel for the crop year 1941, per 100 pounds, was as follows:

	Clarksburg	Average
1941	\$3.970	\$3.950

Defendant further alleges in this connection that it does not know, and that it never has known, the individual net returns from sugar sales by the two manufacturers of beet sugar, other than itself, and having factories north of the 36th parallel.

(n) Admits that plaintiff has employed the services of attorneys at law for the purpose of bringing this action.

Third Defense

3. On or about August 31, 1942, an account in writing was stated by and between defendant and plaintiff wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1941 and paid to said defendant for said beets the sum of \$27,080.00, being the sum found and stated to be due in and by such accounting. Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Fourth Defense

4. Plaintiff entered into, executed and performed that certain standard form contract with defendant, a copy of which is annexed to said complaint and marked Exhibit D, of its own free will and volition and with full knowledge of each and all of the terms and contents of said contract.

Fifth Defense

5. Any and all claims, demands or causes of action attempted to be set forth in said complaint and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than four years prior to the date of the commencement of this action, are barred (a) by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of California or (b) by the provisions of Section 343 of said code.

Sixth Defense

6. Any and all claims, demands or causes of ac-

tion attempted to be set forth in said complaint and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than three years prior to the date of the commencement of this action, are barred (a) by the provisions of subdivision 1 of Section 338 of the Code of Civil Procedure of California or (b) by the provisions of subdivision 4 of said Section 338 of said code.

Seventh Defense

7. Any and all claims, demands or causes of action attempted to be set forth in said complaint and as well any [249] and all parts or portions of any of said claims, demands or causes of action, which accrued more than two years prior to the date of the commencement of this action, are barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of California.

Eighth Defense

8. Any and all claims, demands or causes of action attempted to be set forth in said complaint and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than one year prior to the date of the commencement of this action, are barred by the provisions of subdivision 1 of Section 340 of the Code of Civil Procedure of California.

Wherefore, this defendant prays that plaintiff take nothing by his said complaint herein; that this Court determine, either in the event of recovery by plaintiff or otherwise, whether this defendant is entitled to any credits, offsets or payments under and

by virtue of the above mentioned contract, Exhibit D; and, if so, that judgment be entered in accordance with said determination.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed December 10, 1948. [250]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO COMPLAINT

Now comes plaintiff and leave of court having been obtained, amends his complaint herein as follows:

I.

Amends paragraph XVII to read as follows:

(A) That portion of California north of the 36th parallel is, in this paragraph, referred to as "northern California". That portion of California south of the 36th parallel is herein referred to as "southern California."

(B) The general method of paying for sugar beets in the United States was at all times herein involved a method commonly known and referred to by growers and manufacturers and by Government officials in the beet sugar industry as "the 50-

50 method." Under this method the grower received 50% of the sales price of the sugar and sugar by-products manufactured by the manufacturer from the sugar [252] beets and the manufacturer received the other 50%. The fair market price of beets during the cropping seasons herein involved in the United States was at least that price which would pay to the grower one-half of the amount received by the manufacturer of the sugar from the beets of that grower for the sugar and sugar by-products produced from said beets by the manufacturer. In such a pricing, the grower was entitled to receive at least one-half of the amount so received by the manufacturer, regardless of when the sugar produced from said beets was sold and regardless of whether the sugar produced from beets delivered in one crop year was sold in that crop year or at or during the next crop year, and if the sugar produced from beets in one crop year was sold in the next crop year at a higher price, then the grower was entitled to receive at least one-half of the said higher price.

(C) Plaintiff is informed and believes and upon such information and belief alleges that the conspiracy above referred to was a part of a conspiracy to restrain interstate commerce in the sugar beets entered into by defendant and all other sugar beets manufacturers with plants in California and with other sugar beet manufacturers with plants in various parts of the United States outside of California whereby the manufacturers of sugar from sugar beets in various beet-producing areas of the United States (of which northern California was one and

southern California was another) agreed between themselves that in each area the said manufacturers would fix the price to be paid the growers in each area and would pay such growers only a price determined by the average return of all manufacturers of sugar from sugar beets in each area; as a part of said general conspiracy, the above conspiracy as to northern California was entered into; as part of said general conspiracy, defendant and all manufacturers of sugar beets in southern California adopted and used during said cropping seasons a method of paying growers based only on the average returns of all manufacturers of sugar beets in said area; and as part of said [253] general conspiracy defendant, in various other beet producing areas outside of California (unknown to plaintiff but particularly within defendant's knowledge) made payments to the growers therein during said periods, based solely on a price determined by the average return of sugar sales of all manufacturers in each of said areas.

(D) Certain of the beets produced by plaintiff, as aforesaid, and delivered to defendant, were by defendant shipped to defendant's sugar factory in southern California, located at Oxnard, where said beets were manufactured into sugar by defendant. The amount of beets so shipped is particularly within the knowledge of defendant. Said beets, when they reached the said southern California factory of defendant at Oxnard, were mingled with beets raised by various southern California growers and manufactured into sugar and it was, and at all times it has been, impossible to differentiate the sugar manu-

factured from plaintiff's beets from that manufactured from beets grown in southern California.

(E) During the crop years 1939, 1940 and 1941, there were four manufacturers that operated sugar beet refineries in southern California. Defendant is one of these four. Plaintiff is informed and believes and upon such information and belief alleges that said four manufacturers, including defendant, had, as a part of the general conspiracy above referred to, entered into a conspiracy in restraint of trade covering southern California, in the same manner as defendant and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the manufacture thereof into sugar in northern California. Plaintiff is informed and believes and upon such information and belief alleges that during said cropping years, said defendants and the other three manufacturers of sugar beets in southern California had, pursuant to said conspiracy, fixed and agreed upon prices to be paid growers of sugar beets manufactured into sugar [254] in their various southern California factories, which said price was the price determined upon the average net returns from the sale of the sugar of all the sugar manufacturers having factories in southern California, regardless of the return of any individual manufacturer.

(F) Plaintiff is informed and believes and upon such information and belief alleges that in determining the average net price to be paid growers of sugar beets grown in northern California, the accountants who determined the same, pursuant to said growers'

contracts, hereinabove referred to, did not include therein the returns from the sugar produced from beets grown in northern California and delivered to defendant by plaintiff and other growers in the 1939, 1940 and 1941 cropping seasons but manufactured into sugar at the Oxnard plant of defendant. Plaintiff is informed and believes and upon such information and belief alleges that plaintiff and the other growers of sugar beets in California north of the 36th parallel, whose beets were delivered to defendant but were manufactured by defendant into sugar at its Oxnard plant, received no portion of the sales return from the sugar produced from said beets. Plaintiff is informed and believes and upon such information and belief alleges that in determining the average net returns paid growers of sugar beets raised in southern California during the cropping years 1939, 1940 and 1941, the accountants who determined the same included therein the returns from sugar produced by defendant in southern California from beets grown in northern California by plaintiff and other growers and delivered to defendant. Plaintiff is informed and believes and upon such information and belief alleges that the prices paid growers of sugar beets in southern California during said cropping years were determined by defendant and other manufacturers of sugar from sugar beets in southern California by using the average net return secured by the southern California manufacturers of sugar from sugar beets, including [255] defendant, from the sale of sugar produced at the southern California plants of said manufacturers,

including defendant, from sugar beets refined at said southern California plants, regardless of where said sugar beets were produced, including sugar beets produced in northern California by plaintiff and other growers of sugar beets in northern California and shipped by defendant to its southern California plant.

(G) Plaintiff is informed and believes and upon such information and belief alleges that the average net return from sugar manufactured in southern California during the cropping years 1939, 1940 and 1941 were greater than the average net return from sugar manufactured during the same cropping years in northern California; that as a result of the method of accounting used by defendant and the accountants who determined the average net return in northern California and the accountants who determined the average net return in southern California defendant and its co-conspirators as a part of said conspiracy during said cropping years, kept for themselves and did not turn over to plaintiff and the other growers any portion of the proceeds secured from the sugar beets of plaintiff and other growers in northern California whose beets were manufactured into sugar in southern California.

(H) Defendant paid plaintiff certain sums for the 1939, 1940 and 1941 crops of sugar beets raised by plaintiff but in carrying out said conspiracy and as a part and parcel thereof,

(a) defendant did not pay plaintiff the reasonable value of the sugar beets delivered by plaintiff to defendant;

(b) defendant did not pay plaintiff upon the basis of the price secured from sugar manufactured from the beets delivered by plaintiff and other growers located north of the 36th parallel to defendant;

(c) defendant did not pay plaintiff a price based upon [256] the net return from sugar manufactured by defendant from the beets delivered to defendant by plaintiff and other growers of sugar beets in northern California;

(d) defendant did not pay plaintiff at least the minimum price determined by the Secretary of Agriculture as aforesaid;

(e) defendant paid plaintiff by taking the average net return from sugar sold during the respective crop years by the defendant and the other two manufacturers who had sugar factories in northern California, and not including therein any return from sugar sold subsequent to said crop years from sugar manufactured during said crop years from beets produced during said crop years and not including therein the return from sugar manufactured in southern California from sugar beets grown and delivered to defendant during said respective crop years in northern California;

(f) defendant did not pay plaintiff or other growers in northern California for their beets shipped to Oxnard the prices paid other growers whose beets were also processed at Oxnard but were raised in southern California.

(I) Had it not been for said unlawful plan and

conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, and if plaintiff had received the reasonable value of his sugar beets in a market unfettered and unhampered by said plan and conspiracy, plaintiff is informed and believes and upon such information and belief alleges that plaintiff would have received \$50,000.00 more than he did receive under said contract, and plaintiff sustained damage accordingly, none of which damage has been paid. The exact amount that plaintiff was damaged, as aforesaid, can only be determined by an accounting whereby defendant accounts to plaintiff for one-half the net return secured from the sugar manufactured from the sugar beets produced by plaintiff during said cropping years, regardless of where the beets [257] were manufactured into sugar and regardless of whether the sugar produced from said sugar beets was sold during or subsequent to the crop year in which said sugar beets were grown, and whereby defendant accounts to plaintiff for not less than the price fixed by the Secretary of Agriculture as minimum and whereby defendant accounts to plaintiff for the price paid growers of sugar beets in northern California, southern California or the nearest market for sugar beets, free from any agreements in restraint of trade in which defendant is or was a party, whichever one was highest. Defendant has refused all requests and demands of plaintiff for information on which plaintiff could determine and could herein plead the specific amounts due to plain-

tiff. Plaintiff is entitled, by virtue of paragraph 15 of the Anti-Trust laws of the United States (15 U.S.C., Sec. 15) to have such damages trebled.

II.

Amends sub-paragraph (e) of Paragraph IX of said complaint by striking out the last sentence reading "The reasonable price for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in Paragraph XIV hereof" and by substituting the following: "The reasonable price for sugar beets for the crop years here involved was as plaintiff is informed and believes and therefore alleges \$50,000 more than plaintiff received for said years".

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT.

Acknowledgment of Service attached.

[Endorsed]: Filed March 2, 1949. [258]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO ANSWER TO COMPLAINT
AS AMENDED

Now comes defendant American Crystal Sugar Company, a corporation, and after consent of plaintiff first had and obtained, for amendment to its answer to the complaint, as amended, alleges as follows:

Second Defense

2.

* * *

(g) Admits that this defendant had sugar beet seeds available during said period for growers who contracted with it under form contracts of the type referred to in the next succeeding subparagraph (h) of this Paragraph 2; admits that [260] it is its understanding that the other manufacturers referred to in Paragraph VI of said complaint likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources, except to the extent that it is informed and believes and therefore alleges that Union Sugar Company, which said company has its principal office in San Francisco, California, sold seeds during the period from 1938 to 1942, or at least during some portions of said period, to sugar beet growers in California north of the 36th parallel.

* * *

(i) Admits the allegations contained in Paragraph X, except the following: Alleges that it is

without knowledge or information sufficient to form a belief as to the truth of the allegations set forth on page 8 of the complaint, commencing at line 32, with the word "while," and ending on page 9 at line 11 of said complaint.

* * *

(l) Admits the allegations contained in subparagraph A of Paragraph XVII.

(m) Admits the allegations contained in subparagraph D of Paragraph XVII, except the following: Alleges that although it does know the tonnage, at the point of delivery, of the beets produced by plaintiff and delivered to it which were subsequently shipped to its refinery in southern [261] California located at Oxnard, it does not know the tonnage of plaintiff's beets so shipped at the point of commencement of shipment to said refinery at said Oxnard.

(n) Answering the allegations of subparagraph E of Paragraph XVII, alleges that during the crop year 1941 there were three manufacturers who operated sugar beet factories in southern California, to wit, Holly Sugar Corporation, Union Sugar Company, and defendant. Attached hereto, marked Exhibits 1 to 6, inclusive, respectively, and made a part hereof are copies of the contracts in force during said crop year between said manufacturers and the growers in said area.

(o) Admits the allegations contained in subparagraph F of Paragraph XVII, except the following: Denies the allegations set forth on page 4 of the amendment to the complaint commencing at line 14.

with the phrase "Plaintiff is informed and" and ending at line 19 of said page.

(p) Answering the allegations of subparagraph G of Paragraph XVII, admits and alleges that the average joint net return from sugar manufactured in southern California during the cropping year 1941 was greater than the average joint net return from sugar manufactured during the same cropping year in northern California.

(q) Answering the allegations of subsections (b), (c) and (d) of subparagraph H of Paragraph XVII, admits and alleges that payments made to plaintiff for the crop year 1941 [262] were made in manner and form as provided in Exhibit D annexed to the complaint. Admits the allegations contained in subsections (e) and (f) of subparagraph H of Paragraph XVII.

(r) Admits that plaintiff has employed the services of attorneys at law for the purpose of bringing this action.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

* * * *

Acknowledgment of Service attached.

[Endorsed]: Filed March 18, 1949. [263]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO ANSWER

Pursuant to leave of court first had and obtained, defendant amends its fourth defense herein to read as follows:

Fourth Defense

If defendant was in fact a party to any combination or conspiracy to establish or to maintain a joint price determination factor with reference to the purchase and sale of sugar beets in Northern California, plaintiff at all times during the crop year 1941 knew of the existence of such combination or conspiracy, if any there was, and then and there aided and abetted in the consummation thereof by voluntarily entering into the standard form contract for said year, copy [273] of which is annexed to said complaint as an exhibit, then and there sold its beet crop for said year pursuant to the terms and conditions thereof, and knowingly participated in such combination or conspiracy by agreeing to sell and selling his beets at a price determined by the utilization of such price determination factor.

O'MELVENY & MYERS
PIERCE WORKS
JOHN WHYTE

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 21, 1950. [274]

At a stated term, to-wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 9th day of January in the year of our Lord one thousand nine hundred and fifty.

Present:

The Honorable Ben Harrison, District Judge.

[Title of Causes Nos. 4643, 8353.]

MINUTE ORDER

For (1) pre-trial hearing pursuant to order filed Nov. 21, 1949, and (2) motion of plaintiffs in Case No. 4643-BH Civil to strike portions of plaintiffs' complaint as amended, pursuant to notice and motion, filed Dec. 27, 1949; S. M. Arndt, Esq., appearing as counsel for plaintiff; Pierce Works, John Whyte, and Donald S. Graham, Esqs., appearing as counsel for defendant;

The Court makes a statement relative to counsel complying with the pre-trial order in certain respects. Statements are made by Attorneys Arndt and Works. The Court orders motion (2) of plaintiffs in Case No. 4643-BH Civil to strike portions of plaintiffs' complaint as amended, granted, there being no objection thereto by defendant.

The Court and counsel have a further discussion; and the Court orders the trial date of Feb. 7, 1950, vacated, and the causes are re-set for trial Feb. 21, 1950, 10 a.m.

On motion of Attorney Works, it is ordered that Donald S. Graham, Esq., of the law firm of Lewis, Grant, Newton, Davis, and Henry, of Denver, Colorado, is admitted to practice in this Court for the purposes of these cases only and associated with attorneys for defendants herein. [302]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 21st day of February in the year of our Lord one thousand nine hundred and fifty.

Present:

The Honorable Ben Harrison, District Judge.

[Title of Causes Nos. 4643, 8353.]

MINUTE ORDER

For trial; Stanley Arndt, Esq., appearing as counsel for plaintiffs in Case No. 4643-BH Civil and for plaintiff in Case No. 8353-BH Civil; Pierce Works and John Whyte, Esqs., appearing as counsel for defendant in each case; Donald S. Graham, Esq., appearing as associate counsel for defendant; all parties answer ready; whereupon, pursuant to stipulation and order of Court these two causes are consolidated for the purposes of trial.

Attorney Works, for defendants, makes a statement and presents Amendment to Answer in Case

No. 8353-BH Civil, and Amendment to Answer as amended in Case No. 4643-BH Civil, which are filed.

Counsel discuss the matter of an amending of the pre-trial stipulation, filed Jan. 4, 1950, in paragraphs 30 and 31.

The Court makes a statement. Attorney Works makes a statement on behalf of defendants and refers to, and reads from the decision of the U. S. Supreme Court in appeal in Case No. 4643-BH Civil.

Attorney Arndt makes a statement on behalf of plaintiffs. The Court makes a further statement.

At 11 a.m. court recesses. At 11:06 a.m. court reconvenes herein and all being present as before, including counsel for both sides, Court orders trial proceed. [303]

Counsel have a further discussion of the pre-trial stipulation filed Jan. 4, 1950. Plaintiffs' counsel offers in evidence pre-trial stipulation filed Jan. 4, 1950, and it is admitted in evidence subject to correction if any errors appear.

Attorney Arndt reads certain Interrogatories of plaintiffs and Answers of defendant thereto into the record, and makes a statement of the Interrogatories by number and answers thereto which he offers in evidence, and states that he will furnish a typewritten list of Interrogatories of plaintiffs and Answers thereto, each Interrogatory followed by the Answer for the record herein.

At noon court recesses to 2 p.m. today. At 2 p.m. court reconvenes herein and all being present as before, including counsel for both sides, Court orders trial proceed.

Attorney Arndt offers in evidence and reads into the record portions of the deposition of H. E. Zitkowski, (2 vols.) heretofore filed July 8, 1949, and pursuant to Court's order said deposition is opened and filed.

At 3:03 p.m. court recesses. At 3:10 p.m. court reconvenes herein and all being present as before, including counsel for both sides, Court orders trial proceed.

Attorney Arndt offers in evidence and reads into the record portions of the depositions of Lester J. Holmes, heretofore filed June 9, 1949, and Myron W. Hardy, heretofore filed Sept. 19, 1949, and pursuant to Court's order said depositions are opened and filed.

At 4:05 p.m. Court orders further trial of these consolidated causes continued to Feb. 23, 1950, 10 a.m. [304]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO ANSWER AS
AMENDED

Pursuant to leave of Court heretofore had and obtained, defendant amends its eleventh and twelfth defenses herein to read as follows:

Eleventh Defense—Mandeville

11. If defendant was in fact a party to any combination or conspiracy to establish or to maintain a

joint price determination factor with reference to the purchase and sale of sugar beets in Northern California, Mandeville Island Farms, Inc. at all times during the crop years 1939 and 1940 and each of them, [305] knew of the existence of such combination or conspiracy, if any there was, and then and there aided and abetted in the consummation thereof by voluntarily entering into the standard form contracts for each of said years, copies of which are annexed to said complaint as exhibits, then and there sold its beet crop for each of said years pursuant to the terms and conditions thereof, and knowingly participated in such combination or conspiracy by agreeing to sell and selling its beets at a price determined by the utilization of such price determination factor.

Twelfth Defense—Zuckerman

12. If defendant was in fact a party to any combination or conspiracy to establish or to maintain a joint price determination factor with reference to the purchase and sale of sugar beets in Northern California, Roscoe C. Zuckerman at all times during the crop year 1941 knew of the existence of such combination or conspiracy, if any there was, and then and there aided and abetted in the consummation thereof by voluntarily entering into the standard form contract for said year, copy of which is annexed to said complaint as an exhibit, then and there sold his beet crop for said year pursuant to the terms and conditions thereof, and knowingly participated in such combination or conspiracy by

agreeing to sell and selling his beets at a price determined by the utilization of such price determination factor.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 21, 1950. [306]

[Title of District Court and Cause—No. 4643.]

STIPULATION AS TO ADDITIONAL FACTS

It Is Hereby Stipulated by and between the parties hereto, subject to the objections hereinafter specified by defendant (which are hereby submitted for the Court's consideration) that the following matters are true, and that the reporter shall add to the transcript of the proceedings herein the contents of this stipulation in such manner as will be most convenient to the Court. The matters stipulated to are as follows:

1. That the books of American Crystal Sugar Company are kept on the basis of a fiscal year ending March 31 of each year; that the net profits of American Crystal Sugar Company [342] before federal income and undistributed profits taxes, but after depreciation, as shown by the books of the company, are as follows:

The year ending March 31, 1935	\$1,400,130.22
The year ending March 31, 1936	1,235,261.49
The year ending March 31, 1937	2,207,707.14
The year ending March 31, 1938	1,469,464.71
The year ending March 31, 1939	592,674.43
The year ending March 31, 1940	1,463,058.87
The year ending March 31, 1941	1,855,574.07
The year ending March 31, 1942	3,500,094.75
The year ending March 31, 1943	2,542,226.66

That the books of said company do not show the net profits as of any date other than March 31 of each year.

Objection

The foregoing facts set forth in the foregoing Paragraph 1 are objected to by the defendant upon the following specified grounds and each of them: That they and each of them are irrelevant and immaterial, do not prove or disprove or tend to prove or disprove any issue in this case, are so remote as regards any triable issue herein as to have no probative value with reference thereto, and involve so many diverse elements bearing no relationship whatever to the issues herein as to make any use of them herein purely speculative and uncertain.

2. That the attached geographical distribution of sales has been prepared by defendant from its books and records and show the geographical distribution of sales from the Oxnard, California, factory; the Missoula, Montana, factory; the Rocky [343] Ford, Colorado, factory; the Grand Island, Nebraska, factory; the Mason City, Iowa, factory; the Chaska,

Minnesota, factory ; and the East Grand Forks, Minnesota, factory of Crystal for the years 1937 to 1942, both inclusive.

3. Attached hereto is a comparative tabulation of net returns from sales of sugar from Crystal, Holly and Spreckels for the years 1937 through 1942. The data for Holly and Spreckels was furnished by said corporations respectively.

Dated: April 13, 1950.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant. [344]

GEOGRAPHICAL DISTRIBUTION OF SALES OF OXNARD, CALIFORNIA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Arizona.....	12,089	8,659	8,841	20,068	22,232	14,030
Arkansas.....	600	9,800	53,150	18,900	9,800	600
California—North.....	800	.....	200	1,987	.....	133,800
California—South.....	292,224	231,135	307,206	516,403	454,740	444,352
Colorado.....	4,980	.....	1	16	254	2,545
Connecticut.....	.....	.....	.....	.....	2,200	1,198
District of Columbia.....	.....	.....	2,000	.....	2,400	.....
Illinois.....	.....	.....	116,619	120,932	14,651	34,358
Indiana.....	.....	.....	1,600	2,400	8,000	7,236
Iowa.....	5,148	12	2,400	800	1,619	33,758
Kansas.....	600	.....	4,475	644	615	8,000
Louisiana.....	.....	600	600	.....	.....	.....
Maryland.....	.....	.....	26,074	.....	6,707	5,800
Massachusetts.....	.....	.....	21,302	19	11,400	2,098
Michigan.....	.....	.....	.....	.....	378	10,816
Minnesota.....	4,885	.....	3,293	10,825	11,911	33,442
Missouri.....	2,400	.....	19,808	5,030	7,575	7,975
Nebraska.....	1,760	.....	.....	5,334	1,660	11,096
Nevada.....	.....	.....	.....	.....	900	.....
New Hampshire.....	.....	.....	.....	.....	800	.....
New Jersey.....	.....	1,597	4,381	.....	7,200	4,901
New Mexico.....	25,712	44,274	21,540	12,590	3,100	6,775
New York.....	.....	6,000	159,237	303	51,429	32,738
Ohio.....	.....	.....	.....	.....	17,164	10,588
Oklahoma.....	35,600	76,334	110,766	119,175	53,752	14,087
Oregon.....	1,754	.....	37,598	.....	.....	6,390
Pennsylvania.....	.....	.....	15,787	.....	33,150	29,094
Rhode Island.....	.....	.....	.....	.....	800	.....
South Dakota.....	.....	.....	.....	.....	.....	600
Tennessee.....	.....	.....	1,200	.....	.....	.....
Texas.....	23,210	81,158	272,349	131,299	42,252	21,288
Virginia.....	.....	.....	.....	.....	1,400	.....
Washington—Coast.....	36	.....	600	1	10,000	1,491
Washington—Inland.....	.....	.....	3,200	.....	.....	2,217
West Virginia.....	.....	.....	.....	.....	6,995	5,825
Wisconsin.....	1,107	.....	1,600	.....	600	11,258
Total.....	412,905	459,569	1,195,827	966,726	785,684	898,356

GEOGRAPHICAL DISTRIBUTION OF SALES OF MISSOULA, MONTANA, FACTORY
FOR CROP YEARS 1937-1942

State	1937	1938	1939	1940	1941	1942
Idaho.....	24,808	23,385	12,943	6,095	5,556	5,393
Illinois.....	2,856	12,254	53,083	37,748	50,555	12,201
Indiana.....	600	1,880	16,250	.....	5,624	2,432
Iowa.....	29,236	8,018	1,078	1,450	1,920	7,258
Kansas.....	.....	450	.....	.....	580	.....
Kentucky.....	.....	.....	.....	.....	.....	1,100
Maryland.....	.....	.....	.....	.....	1,150	800
Massachusetts.....	.....	.....	.....	.....	800	.....
Michigan.....	.....	600	6,600	2,400	200	1,898
Minnesota.....	27,353	26,868	73,290	114,342	81,026	42,260
Missouri.....	.....	.....	.....	.....	800	5,000
Montana.....	109,841	131,264	180,375	74,298	95,323	55,435
Nebraska.....	7,878	.....	.....	600	14,932	468
New Jersey.....	.....	.....	.....	.....	1,600	.....
New York.....	.....	.....	.....	.....	5,000	11,800
North Dakota.....	16,826	28,230	48,593	40,628	33,984	18,422
Ohio.....	.....	.....	2,400	.....	3,225	4,271
Pennsylvania.....	.....	.....	.....	.....	6,650	6,863
South Dakota.....	31,648	41,002	54,530	38,233	26,246	18,050
Virginia.....	.....	.....	.....	.....	880	.....
Washington—Coast.....	.....	.....	.....	.....	543	3,002
Washington—Inland.....	29,033	29,072	22,648	12,523	27,805	30,058
West Virginia.....	169	.....	.....	.....	675	5
Wisconsin.....	3,600	2,645	44,612	42,620	72,925	22,073
Total.....	283,848	305,668	516,402	370,937	437,999	248,789

GEOGRAPHICAL DISTRIBUTION OF SALES OF ROCKY FORD, COLORADO, FACTORY

FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Arkansas.....	.....	600	.....	.....	.....	800
Colorado.....	80,638	82,885	86,455	126,031	143,383	110,442
Connecticut.....	.....	.....	.....	.....	2,400	.....
District of Columbia.....	.....	.....	.....	.....	800	.....
Illinois.....	1,918	66,349	744	2,000	25,181	44,844
Indiana.....	.....	12,600	18,600	.....	800	4,400
Iowa.....	38,492	26,493	651	.....	5,593	19,972
Kansas.....	37,051	98,124	130,468	104,720	68,527	57,218
Kentucky.....	.....	.....	800	.....	.....	.....
Maine.....	.....	.....	.....	.....	1,600	.....
Maryland.....	.....	.....	.....	.....	3,400	1,000
Massachusetts.....	.....	.....	.....	.....	5,400	.....
Michigan.....	747	5,046	15,800	.....	1,084	17,652
Minnesota.....	1,135	7,000	2,988	877	10,202	1,697
Missouri.....	41,800	73,494	105,867	115,714	148,212	82,330
Nebraska.....	600	.....	.....	1,168	4,581	.....
New Jersey.....	.....	.....	.....	.....	7,706	.....
New Mexico.....	14,110	30,092	39,906	19,394	4,810	10,416
New York.....	.....	.....	.....	.....	25,096	18,017
Ohio.....	.....	4,800	5,600	.....	10,400	7,862
Oklahoma.....	31,900	6,000	400	6,900	6,812	48,164
Pennsylvania.....	.....	.....	.....	.....	8,000	23,374
Rhode Island.....	.....	.....	.....	.....	1,775	.....
South Dakota.....	600	.....	2,400	.....	600	.....
Tennessee.....	.....	800	.....	.....	.....	.....
Texas.....	1,200	600	.....	600	.....	26,704
Vermont.....	.....	.....	.....	.....	800	800
Virginia.....	.....	.....	.....	.....	4,400	.....
West Virginia.....	.....	.....	.....	.....	1,800	847
Wisconsin.....	3,201	22,159	7,007	.....	10,925	3,796
Total.....	253,392	437,042	417,686	377,404	504,287	480,335

GEOGRAPHICAL DISTRIBUTION OF SALES OF GRAND ISLAND, NEBRASKA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Connecticut.....	.....	.....	.....	.....	2,400	.....
Illinois.....	.....	7,206	59,488	8,800	6,400	21,110
Indiana.....	.....	600	26,384	4,806	.....	.....
Iowa.....	2,410	1,200	.....	1,064	6,435	11,130
Kansas.....	.....	600	.....	.....	600	.....
Louisiana.....	.....	.....	.....	.....	.....	799
Maryland.....	.....	.....	.....	.....	1,800	.....
Massachusetts.....	.....	.....	.....	.....	1,600	.....
Michigan.....	.....	.....	6,800	.....	.....	.....
Minnesota.....	.....	6,473	6,050	3,800	1,200	3,400
Missouri.....	600	600	2,000	1,200	1,800	2,071
Nebraska.....	144,478	214,452	318,126	314,970	204,547	171,232
New York.....	.....	.....	.....	.....	8,350	6,200
North Dakota.....	.....	.....	.....	.....	.....	300
Ohio.....	.....	.....	2,400	.....	3,000	2,225
Pennsylvania.....	.....	.....	.....	.....	3,400	7,692
South Dakota.....	4,200	6,600	7,600	8,400	4,800	4,825
Virginia.....	.....	.....	.....	.....	1,600	.....
Wisconsin.....	.....	3,200	10,850	3,600	.....	2,400
Total.....	151,688	240,931	439,698	346,640	247,932	233,384

GEOGRAPHICAL DISTRIBUTION OF SALES OF MASON CITY, IOWA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Illinois.....	.....	6,499	42,731	5,115	2,391	1,719
Indiana.....	.....	.....	800	.....	.....	3,701
Iowa.....	170,339	292,580	395,058	332,822	346,497	200,545
Maryland.....	.....	.....	.....	.....	900	1,608
Massachusetts.....	.....	.....	.....	.....	800	800
Michigan.....	.....	.....	.....	400	.....	.....
Minnesota.....	13,753	9,450	19,800	32,033	36,447	34,753
Missouri.....	550	.....	.....	.....	.....	.....
New York.....	.....	.....	.....	.....	.....	5,101
Ohio.....	.....	.....	.....	.....	.....	4,301
Pennsylvania.....	.....	.....	.....	.....	.....	11,927
South Dakota.....	.....	.....	.....	600	.....	.....
West Virginia.....	.....	.....	.....	.....	.....	1,800
Wisconsin.....	1,525	2,150	7,907	13,022	12,875	35,202
Total.....	186,167	310,679	466,296	383,992	399,910	301,457

GEOGRAPHICAL DISTRIBUTION OF SALES OF CHASKA, MINNESOTA, FACTORY

FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
California—North.....	1	.....	.....	.....	1	.....
California—South.....	2	.....	.....	.....	1	.....
Illinois.....	.....	.....	800	1,627	.....	3,400
Indiana.....	.....	.....	.....	.....	800	.....
Iowa.....	.....	9,253	9,184	5,255	1,528	1,405
Maryland.....	.....	.....	.....	.....	800	.....
Michigan.....	5,435	4,363	3,850	2,950	.....	.....
Minnesota.....	120,440	190,494	219,892	220,410	199,067	201,135
Missouri.....	250	.....	.....	.....	.....	.....
Montana.....	1	.....	.....	.....	1	.....
New York.....	.....	.....	.....	.....	800	4,980
North Dakota.....	.....	.....	27	.....	.....	.....
Ohio.....	.....	.....	.....	.....	842	800
Pennsylvania.....	.....	.....	.....	.....	1,600	3,400
South Dakota.....	.....	.....	600	.....	.....	.....
West Virginia.....	.....	.....	.....	.....	800	800
Wisconsin.....	43,020	74,201	80,579	79,966	39,883	27,583
Total.....	169,149	278,311	314,902	310,208	246,123	243,503

GEOGRAPHICAL DISTRIBUTION OF SALES OF EAST GRAND FORKS, MINNESOTA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Illinois.....	.....	3,200	.....	800	.....	15,695
Indiana.....	.....	.....	.....	.....	.....	2,712
Iowa.....	.....	1,200	.....	.....	.....	.....
Kentucky.....	.....	.....	.....	.....	.....	1,100
Maryland.....	.....	.....	.....	.....	1,000	.....
Massachusetts.....	.....	.....	.....	.....	.....	1,000
Michigan.....	1,250	3,099	687	.....	2,500	5,079
Minnesota.....	305,489	418,953	414,926	392,071	335,780	316,216
New Jersey.....	.....	.....	.....	.....	800	.....
New York.....	.....	.....	.....	.....	1,000	8,981
North Dakota.....	84,805	108,566	98,183	110,834	95,002	56,458
Ohio.....	.....	.....	.....	.....	.....	4,633
Pennsylvania.....	.....	.....	.....	.....	.....	11,745
South Dakota.....	8,400	8,800	3,600	600	1,200	3,087
Virginia.....	.....	.....	.....	.....	967	.....
West Virginia.....	.....	.....	.....	.....	.....	1,600
Wisconsin.....	22,760	20,274	21,580	20,364	28,789	79,503
Total.....	422,704	564,092	538,976	524,669	467,038	507,809

RETURNS FROM SALES OF SUGAR

1939			1942		
Spreckels	Joint	Crystal	Crystal	Holly	Spreckels
\$4.4328	\$4.388	\$4.450	\$5.313	\$5.555*	\$5.4916
.5350	.535	.535	.535	.535	.5350
.5409	.479	.387	.257	.373	.3741
.0053	.009	.014	.013	.....	.0095
.0157	.021	.078	.057	.....	.0332
.0656	.060	.113	.034	.....	.0596
.0519	.053	.065	.076	.....	.1015
.0507	.051	.048	.038	.....	.0434
.0640	.049	.047	.057	.....	.1043
<u>\$3.1037</u>	<u>\$3.131</u>	<u>\$3.163</u>	<u>\$4.246</u>	<u>\$4.647**</u>	<u>\$4.2310</u>

[Title of District Court and Causes—4643-8353.]

STIPULATION AS TO CERTAIN FACTS

It Is Hereby Stipulated by and between the parties that the mathematical results of applying the average of the 1937-1938 Crystal-Clarksburg “net returns” to the 1939, 1940 and 1941 sugar beets actually delivered by Mandeville, Zuckerman and Evans, instead of applying the respective 1939, 1940 and 1941 joint net returns, would result in amounts in excess of those actually received by the respective plaintiffs, as follows: [356]

(a) 1939	Mandeville	\$15,749.51
(b) 1940	Mandeville	14,321.61
(c) 1941	Zuckerman	nothing
(d) 1941	Evans	nothing

Dated: Dec. 20, 1950.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

O'MELVENY & MYERS,
DONALD S. GRAHAM,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

[Endorsed]: Filed December 26, 1950. [357]

[Title of District Court and Causes—4643-8353.]

MEMORANDUM OPINION

This memorandum is a sequel to *Mandeville Farms et al. vs. American Crystal Sugar Co.*, 334 U. S. 219, wherein I was reversed (64 F. Supp. 265). As I understand the prevailing opinion of the court, the raising and sale of sugar beets to refineries within the state to be processed into sugar within the state constitutes interstate commerce and in the purview of the Sherman Anti-Trust Act. Thus the man with five acres of grapes who sells the same to a winery, who thereafter allows his wine to enter into the stream of interstate commerce, comes [358] within the protection of the anti-trust laws of the nation.

However, the Supreme Court has spoken and there remains nothing further for me to do but fix damages. While it is not possible for this court to fix damages to that degree of certainty that one would hope for, the plaintiffs have suffered damages and under the law should be compensated therefor.

I fix *Mandeville Island Farms, Inc.*, damages at the sum of \$29,771.12; Mr. Zuckerman's at the sum of \$3,528.00 and Mr. Evans' at the sum of \$1,100.00. These amounts represent actual damages and under the law the above amounts will be trebled.

The sum of \$25,000.00 I find is a reasonable amount to be allowed attorneys for plaintiffs.

The amounts allowed are arrived at as follows:

For the years 1939 and 1940, I have allowed the average prices paid for the years 1937 and 1938;

For the year 1941, I have allowed as damages the

sum of 25c per ton. I do not feel justified in using the prices for 1942 as a basis for damages. Such an abnormal year should not be used as a proper guide in fixing actual damages. I believe the amounts so allowed are on the conservative side.

Plaintiffs' counsel is directed to submit to me proposed findings and judgment.

Dated: This 21st day of December, 1950.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed December 21, 1950. [359]

[Title of District Court and Causes—4643-8353.]

**DEFENDANT'S OBJECTIONS TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW PREPARED BY PLAINTIFFS**

Defendant objects to the proposed Findings of Fact heretofore filed in these causes in the following particulars, each objection being designated by the number of the proposed finding to which objection is being made: [360]

1. This proposed finding appears to be an attempt to incorporate as a finding all of the facts to which the parties have stipulated. If it be proposed to have the court adopt as findings of fact facts to which the parties have stipulated, a selection of pertinent ones should be made and specifically proposed as findings. The finding in its present form is uncertain and indefinite. If there are any conflicts, as the finding seems to assume, between the findings

and the stipulated facts, now is the time to resolve them.

8. Defendant objects to that portion of the proposed finding beginning with the new sentence in line 15 to the end of the finding on the grounds that:

(a) The references to "California" and to "other parts of the United States in which Crystal purchased sugar beets and operated sugar factories" (lines 17-18) are irrelevant, the defendant's operations in Northern California being the only ones material to the disposition of the case. And the evidence does not show, as to parts of the United States other than California, any of the facts set forth in lines 15-25 of the findings.

(b) Plaintiffs wholly failed to prove that "the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar" were intermingled with, or directly affected or had any direct relation to "the distribution of sugar in interstate commerce."

(c) The wording of lines 15-28 of the proposed finding apparently has no limitation as to companies [361] involved, but includes all processors of beet sugar. The evidence does not justify a finding as to the activities of processors other than defendant and the other Northern California processors.

9(a). The second sentence is inaccurately phrased, and, in any event, is superfluous and immaterial.

9(c). There is no evidence in the record to support the provisions "or beet sugar refined in one refinery from that refined in another refinery" (lines 3-4, page 8). And compare the language with

that in lines 28-30, page 16. Furthermore, none of this finding has any bearing on the issues in the case.

9(e). There is no evidence to warrant a finding that a grower of sugar beets in Northern California could not sell sugar beets "at a profit except to one of said manufacturers". The parties have stipulated that "The only practicable market available to plaintiffs and other beet growers in California north of the 36th parallel during the crop years 1938-1941 was sale to one or more of the companies having factories in California". (1 Tr. 40.) The evidence shows no more.

Defendant objects to the last sentence in the paragraph as not essential to the decision of the court.

9(f). The proposed finding, if necessary at all, should be limited in scope to Northern California.

9(i). The first sentence is inaccurate in that growers might, and did, grow beets for more than one processor in a season. [362]

9(k). Defendant objects to this proposed finding on the following grounds:

(a) The language in line 16 "of the sale of the sugar content of beets" is inaccurate, since the sale involved is that of the sugar produced from such beets.

(b) The full sentence contained in lines 18 and 19, "This method was in general use wherever Crystal operated", is immaterial.

(c) The language in lines 19 and 20 "During the years 1937 and 1938 (when competitive conditions existed in Northern California)" is improper as in-

ferring, although the evidence does not show, that there were not competitive conditions in various phases of the industry in the years 1939, 1940 and 1941. Furthermore, the proposed finding infers, contrary to fact, that the so-called "profit-sharing" concept of the contract existed only in 1937 and 1938, and not in 1939, 1940 and 1941.

11. Defendant objects to this proposed finding on the following grounds:

(a) The full sentence found in lines 25-27 covers the entire state of California, and to the extent it involves more than Northern California, it is not essential to the disposition of the case. Similarly, the language in lines 27-29 "During said years growers in Southern California were paid on the average net return of the Southern California factories and" is immaterial. [363]

(b) That portion of the proposed finding beginning with a new sentence in line 30, page 11, and continuing through line 4 on page 12, encompasses the entire state of California, and should be limited to Northern California.

12. (lines 5-17). The language in lines 5-7, "at a time unknown to plaintiffs but particularly within the knowledge of defendant, but which defendant did not disclose to the plaintiffs or to the court" is immaterial since defendant admitted an agreement with Holly and Spreckels to pay growers, using as one variable, the joint net return from the sales of sugar from the three companies' Northern California factories, and the quoted language has no bearing on the issues or on the ultimate conclusion

of the court. As a further objection to this portion of the proposed finding, there is no evidence or evidence from which it would be proper to infer the existence of any agreement between the alleged conspirators as to anything except the use of the joint net return, as aforesaid.

The word "Crystal" in lines 15 and 16 should be "Spreckels".

12(c). Defendant objects to line 29, page 12, through line 4, page 13, on the ground that plaintiffs wholly failed to prove that there was no competition between the defendant, Holly and Spreckels during the crop years 1939, 1940 and 1941; on the contrary, defendant's evidence showed highly competitive conditions in the sale of sugar between these companies during said period of time. Defendant objects to the last sentence of this proposed finding since the method of paying growers in Southern [364] California is immaterial to the disposition of the cases.

12(d). Defendant objects to this proposed finding on the following grounds:

(a) The language in lines 7 and 8 "Instead of paying the growers of sugar beets a reasonable price for their beets" is followed by language which is a non sequitur.

(b) The language beginning in line 15 and continuing into line 16 "A similar method was used during said years throughout Southern California" relates to a matter which is immaterial to the disposition of the case.

12(g). Objected to as being both hypothetical and argumentative.

12(h). The activities of the sugar companies in Southern California are not germane to the decision which has been made by the court.

12(i). The record is devoid of evidence to sustain this finding, which enlarges the combination or conspiracy beyond anything alleged or proven.

13(b). This proposed finding is irrelevant to the disposition of the case.

14, 15. Defendant objects to these proposed findings and each of them on the grounds that: [365]

(a) Any findings with reference to the Secretary of Agriculture's determinations are irrelevant to and go wholly outside of the issues. It will be recalled that counsel for plaintiff himself moved to amend his pleadings by eliminating this matter, and the motion was granted. (Tr. of Jan. 9, 1950, pp. 17, 20.)

(b) The references to Southern California plants and to the Arkansas Valley of Colorado are immaterial.

16. The references to Southern California and to the Arkansas Valley in Colorado, and the expression "elsewhere in other states of the United States" are irrelevant and immaterial. (It is assumed that in line 24 the years 1939, 1940 and 1941 are intended instead of the years 1940, 1941 and 1942.)

Defendant objects to the reference in line 6 on page 17 to the term "pooled net return" as being inaccurate language and as being without foundation in the evidence.

17. This proposed finding ignores that portion of the evidence in the testimony of Mr. W. N. Wilds, President of defendant, that he was the one who made the final decision as to the change from the 1938 form to the 1939 form of contract in Northern California (pages 70 and 94 of deposition of W. N. Wilds and others).

18. Defendant objects to lines 6-14 of this proposed finding on the ground that they are so drawn as to raise an inference that there was no competition among the processors of [366] sugar in Northern California during the crop years 1939, 1940 and 1941 as to performance, ability and deficiency of their manufacturing, sales and executive departments. Plaintiffs wholly failed to prove that competition did not continue between the companies during the years in litigation, and evidence of the defendant clearly showed that such competition did exist. The reference to 1938 prices to the growers covers matters which are merged in the findings as to damages; but if these references are deemed material, the finding should also, in all fairness, embrace the fact that in 1937 (the other year utilized by the court as a damage yardstick), and amount paid by each company per average ton of beets (16% sugar content) was Holly \$5.138, Crystal \$5.106 and Spreckels \$5.078.

20. The first sentence, which is repetitious of statements of similar import contained in other proposed findings to the effect that during the crop seasons 1939, 1940 and 1941 competition between de-

fendant, Holly and Spreckels no longer existed, is without foundation in the evidence.

That portion of the proposed finding beginning with the new sentence on line 15, page 19, and continuing through the sentence which ends on line 3, page 20, has no relationship to the decision of this court. The fallacy of attempting to show damage to plaintiffs based on over-all earning figures of defendant is apparent, a completely unreliable method of measuring damages, and one presumably given no consideration by the court. Furthermore, this portion of the proposed finding contains inaccurate representations, since the so-called "50-50" division between the processor and the grower (which concept is only an approximation) relates to the net returns received from the [367] sale of sugar. The net return from sugar, as clearly appears from the evidence in the case, is a figure arrived at by deducting from the gross sales price of sugar certain specified marketing expenses; no manufacturing costs enter into the picture and no other activities of the processor such as agricultural undertakings, sales of by-products, etc., have a place in the so-called "50-50" formula reflected in the schedule of beet prices in the various contracts of defendant. An analysis of the data in evidence shows that the "profit-sharing" arrangement relates to net returns from sugar sold, and the processor might lose money on its over-all operations and yet there would be a "net return" figure. Thus, the portion of the finding in question proceeds on an erroneous premise, and one having

no foundation in the evidence of the case. Furthermore, the finding is wholly unessential.

The use in line 6, page 20, of the words "when there was free competition" is an attempt to color and is not in the nature of a judicial finding of fact, since, as mentioned above in connection with several other objections, plaintiffs wholly failed to prove that there was not competition during the years 1939, 1940 and 1941. Too, the balance of the proposed finding ignores the substantial evidence presented by defendant to show that during the crop years 1939, 1940 and 1941 defendant had bumper crops of sugar at Clarksburg, and that due to this fact defendant had to find markets farther from the factory than had been necessary in 1938 or was necessary in 1942 (see pages 359, 399, 402, 419, 433 Daily Transcript).

21. That portion of this finding contained in line 26, page 20, through line 7, page 21, contains the same unfounded statement as that objected to in connection with other proposed [368] findings to the effect that defendant and other Northern California companies no longer produced and sold sugar in interstate commerce in competition with each other as they had done prior to 1939, 1940 and 1941, the plaintiffs having failed to show this to be so and defendant having shown it was not so. Furthermore, the statement in lines 3 and 4, page 21 that "they pooled their receipts and expenses" is wholly unwarranted by the evidence. Nor is there any foundation whatsoever in the evidence for the statement con-

tained in the sentence beginning on line 7 and ending on line 12 of page 21.

That portion of the proposed finding beginning with the sentence in line 27, page 21, and continuing to the end of the proposed finding ignores the important, apparent fact that to assume that the Company deliberately lost money is contrary to all reason; furthermore, this portion of the finding is directly counter to the evidence which showed continuing keen competition in sugar operations between the companies during the years 1939, 1940 and 1941.

22. The court has stated in its Memorandum Opinion that "There remains nothing further for me to do but fix damages", thus indicating that this court believes that the decision of the Supreme Court has precluded any further inquiry into the question of whether the agreement to use the joint net had the effect on interstate commerce to bring it within the purview of the Sherman Act; consequently, if the court is making its determination as to the effect of the agreement in question on interstate commerce on the basis of what it considers a mandate from the Supreme Court, the Findings of Fact or Conclusions of Law should reflect this [369] fact.

23. The references in this proposed finding to Southern California and to other portions of the United States outside of Northern California are immaterial.

24. This language disregards the showing made in the evidence that during the years in question the

government controlled the acreage planted to beets, and also controlled, by marketing allotments, the quantity of sugar distributed. (See defendant's Exhibits A, B and J.)

25. This finding is repetitious of materials contained in previous proposed findings of fact, (see Nos. 9(d) (e) (f) (g) (i) (j)). And the language in lines 17 through 19 pertaining to the control over the quantity of beets grown and the quantity of sugar sold fails to take into account the matters of government control over acreage and sugar sales referred to in the objection to proposed finding No. 24.

26. Defendant objects to this proposed finding on the ground that plaintiffs have wholly failed to show any lessening of competition "in the later interstate phases of over-all activity", or that "the effects in those phases had repercussions upon the prior ones, including the price received by the growers." Similarly, the record is devoid of evidence showing that the agreement to use the joint net as one of the variables in the formula used in paying for beets "reduced competition in the interstate distribution of sugar" as stated in this finding (line 8, page 24). The evidence was wholly to the contrary. [370]

27. This proposed finding ignores (a) the showing made by defendant as to the control exercised by the government both on the beet acreage and on the sales of sugar during the period in question (see objections to proposed finding No. 24); and (b) the fact that the evidence fails to show any relation-

ship between the interstate distribution of sugar and the price paid for beets.

31. This proposed finding has no relevancy to the issues tried in the case or to the disposition which has been made by the court. The relevancy, if any, would be in connection with the accounting portions of the complaint, which are not involved in these findings.

32. Plaintiffs have wholly failed to show that the alleged conspiracy had any effect whatsoever upon the sale of sugar in interstate commerce "in competition with the sugar of the co-conspirators"; rather, the evidence clearly shows that there was strong competition between the defendant and the other processors of sugar in the sales of sugar throughout the period in question. Defendant further objects to this finding as repetitious of 12(f).

33. The evidence is devoid of any showing that "interstate commerce in sugar was illegally restrained" or restrained at all, or that competition in connection with the interstate shipment of sugar was in any way lessened. And see objection to proposed finding No. 22.

35. This proposed finding is repetitious of proposed [371] finding No. 3.

40(c). Defendant objects to this finding as not based on evidence and as not being a proper inference to be drawn from the evidence, but defendant assumes that the decision which has been made by the court necessarily adopts the reasoning reflected in this finding.

40(d). Defendant objects to this proposed finding on the following grounds:

(a) “net sales” (line 6) probably means “net returns” or “net sales returns”.

(b) the words (lines 6-7) “net sales from all of the beets delivered by plaintiffs to defendant” have no meaning, but assuming that it is intended to mean, in substance, that the net returns of Crystal’s Clarksburg factory during the years 1939, 1940 and 1941 did not include the net returns from all sugar produced from beets delivered by plaintiffs to defendant, defendant objects to the proposed finding on the ground that it has no relevancy to any issue tried by the court or to the disposition of the case, since it relates purely to the accounting phase.

40(e). The practice referred to was carried on both before and after the alleged conspiracy, and the finding has relevancy, if any, only in connection with the accounting counts of the plaintiffs’ complaints. The practice of shipping beets to Oxnard from the Clarksburg area is not shown in any way to have been related to the use of the joint net return of the Northern [372] California processors as a part of the formula used in paying for beets. Defendant further points out the inaccuracy of that portion of this proposed finding beginning with the word “yet” in line 8, page 31, to the end of the proposed finding, in that net return figures do not take into account “total beets delivered”, and that this portion of the finding is not in accordance with the facts as shown by the evidence.

40(f). This proposed finding has no relevancy to the issues tried by the court, its relevancy, if any, being to the accounting portions of the plaintiffs' complaint, not here involved. The evidence shows that the carrying over of sugar from one crop year to another, as done in the years 1939, 1940 and 1941, was also practiced both before and after those years. Furthermore, the evidence clearly shows that the defendant did not exercise "exclusive control as to when sugar was sold and whether sugar of one year was sold that year or in a subsequent year", since, during the crop years 1939, 1940 and 1941 there were government controls on the sale of sugar (see defendant's Exhibit J), with the result that defendant was not a free agent in determining the times at which sugar would be sold.

40(g). Defendant objects to this proposed finding on the ground that the operations at Oxnard have no relevancy to the case; that the practice alluded to in the proposed finding is one which existed both prior to and after the crop years 1939, 1940 and 1941; and that the plaintiff has completely failed to show any connection between the practice and the alleged conspiracy. [373]

In lieu of said findings and in lieu of the conclusions of law and judgment proposed by plaintiffs herein, defendant respectfully presents the accompanying and proposed findings of fact, conclusions of law and judgment, which in the belief of defendant accurately reflect the issues actually tried by the Court, the findings of the Court thereon and the

Court's conclusions and decision with reference thereto.

Dated: January 19, 1951.

Respectfully submitted,

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 19, 1951. [374]

[Titles of District Court and Causes—4643-8353.]

**OBJECTIONS TO SECOND DRAFT OF
PLAINTIFFS' PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
JUDGMENT**

Defendant respectfully renews its objections heretofore filed with reference to the first draft of proposed findings of fact, conclusions of law and judgment heretofore filed by plaintiffs as to all portions of said first draft therein objected to and reproduced in the second draft now on file; and

Defendant further objects to said second draft of [376] findings upon the ground that the same is replete with conclusions and surplusage, does not correctly reflect the case as actually tried, and does not comply with the instructions heretofore given

by the Court with reference to its preparation. In this connection defendant respectfully suggests that in order to correctly reflect the holding of the Court, the findings herein, the conclusions of law and the judgment to be rendered should in substance embrace the following, and that any other matters are pure surplusage and relate to matters not actually tried:

1. Findings as to jurisdictional facts.

2. Findings as to material facts admitted by the pleadings.

3. A finding that the sugar beets involved were planted, grown, harvested and processed by defendant into sugar wholly within the State of California, and that the sugar manufactured therefrom was thereafter transported and sold both in interstate and intrastate commerce.

4. A finding that defendant entered into and, during the crop years 1939, 1940 and 1941 actively participated in and maintained a combination and conspiracy to fix the price of sugar beets purchased by it for processing, through the methods and means of utilizing, with two other sugar processors, a common price determination factor, namely, the joint average net return for sugar sold during a given crop year from the Northern California factories of said three processors.

5. A finding that such combination and conspiracy was in restraint of trade.

6. A finding that each of the three plaintiffs

[377] suffered damage, in specified amounts, resulting from such combination and conspiracy.

7. A conclusion of law to the effect that this Court regards the holding of the Supreme Court on the previous appeal binding upon it as the law of the case and for this reason concludes that the activities found had a substantial effect upon interstate commerce and hence comes within the purview of the Anti-Trust laws.

8. A conclusion of law to the effect that this Court is unable to find, from the evidence, that the activities found had any effect upon the price, supply or competitive conditions with reference to sugar.

9. Judgment for damages, trebled, and for attorneys' fees.

10. Judgment of dismissal of the second and third counts in Action No. 4643, with prejudice.

It is further respectfully suggested that findings of fact, conclusions of law and a judgment along the lines above suggested would fairly and accurately reflect both the case as actually tried and the grounds of the Court's decision.

Dated: February 5, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 5, 1951. [378]

[Title of District Court and Causes—4643-8353.]

OBJECTIONS TO THIRD DRAFT OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND SUGGESTIONS AS TO AMENDMENTS

Defendant respectfully specifies, as being applicable to said Third Draft, each and every objection heretofore specified by it, by its objections duly filed herein on February 5, 1951, to plaintiffs' Second Draft of Proposed Findings of Fact, [380] Conclusions of Law and Judgment.

In addition to the foregoing, defendant respectfully suggests the following modifications of said Third Draft by way of additions thereto or deletions therefrom:

1. Delete that portion of paragraph 5 commencing at page 6, line 7 and ending at page 6, line 18, and reading as follows:

“The various steps involved in the production and sale of beet sugar in California during the years here involved, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now are intermingled with and directly affected by each other and had and have a direct relation upon each other. Each of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was

completed when the sugar was delivered to the purchaser.”

2. Add to paragraph 6(c) at page 8, line 12, the following:

“The beets, however, including the beets purchased from plaintiffs during 1939, 1940 and 1941, all as hereinafter found, were planted, grown, harvested and processed into sugar wholly within the State of California.”

3. In paragraph 9 at page 11, lines 9-10, delete the following: [381]

“and commerce among the several states. . . .”

4. At page 11, line 9 and page 11, line 10, delete the misplaced conclusion of law: “unlawfully”.

5. At page 11, lines 11-12, delete the misplaced conclusion of law:

“all in violation of the anti-trust laws of the United States”.

6. At page 11, line 12, delete the misplaced conclusion of law: “unlawful.”

7. Delete Paragraph 11 at page 13, lines 6 through 10.

8. Delete that portion of Paragraph 12 commencing at page 13, line 11 and ending at page 13, line 24, and reading as follows:

“As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and the other said manufacturers in Northern California producing and selling sugar in interstate commerce from beets raised in Northern California in competition

with each other as they had previously done, they became illegally associated in a combination and conspiracy wherein they ceased to compete in interstate commerce and fixed prices paid growers and paid the beet growers upon a method the effect of which [382] was the same as if they had pooled their receipts and expenses. They thus frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed in said Northern California in 1937 and 1938 prior to said conspiracy.”

9. Delete from Paragraph 18-C-1 at page 16, line 32: “not less than”.

10. Delete from Paragraph 18-C-2 at page 17, line 2: “at least”.

11. Delete from Paragraph 18-C-3 at page 17, line 4: “not less than.”

12. Delete from Paragraph 18-D at page 17, line 8, the misplaced conclusion of law: “unlawful”.

13. Delete from Paragraph 18-D at page 17, line 14 and page 17, line 16: “at least”.

14. Delete from Paragraph 18-D at page 17, lines 19-20:

“These amounts as found herein are on the conservative side.”

15. Revise Paragraph 19 at page 17, lines 23-29 to read as follows:

“By reason of the foregoing acts of the defendant and its said conspirators, competition in sugar beets [383] and the purchase thereof was substantially lessened and the price of sugar beets was fixed, to the damage of plaintiffs as aforesaid.”

16. Delete Paragraph 26 at page 20, lines 1-3.

17. Delete Paragraph 1 of the Conclusions of Law at page 20, lines 11-13.

18. From Paragraph numbered 2 of the Conclusions of Law delete the period at page 20, line 16 and add the following:

“; and for this reason the Court concludes and declares that the activities hereinabove found constituted a combination and conspiracy within the purview of the Anti-Trust laws of the United States, and hence unlawful.”

19. Delete Paragraph numbered 10 of the Conclusions of Law and substitute therefor the following:

“No evidence having been introduced under the second and third counts in Action No. 4643, the same and each of them should be dismissed with prejudice.”

(And the proposed judgment should be modified accordingly.)

Dated: February 15, 1951.

Respectfully submitted,

DONALD S. GRAHAM,
O'MELVENY & MYERS,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 16, 1951. [384]

[Title of District Court and Causes—4643-8353.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cases having been duly consolidated for trial, came on regularly for trial and were tried before the Honorable Benjamin Harrison, United States District Judge, a jury having been waived by all parties. Plaintiffs appeared by Wood, Crump, Rogers and Arndt (by Stanley M. Arndt, Esq.), their attorneys, [386] and defendant appeared by O'Melveny and Myers (by Pierce Works, Esq., and John Whyte, Esq.) and by Donald S. Graham, Esq., its attorneys.

The complaint in action 8353 sought damages by Evans for the years 1939, 1940 and 1941. Defendant filed its motion to dismiss said complaint. Thereupon plaintiff in said action filed his amendment to his complaint pursuant to Rule 15-A of the Rules of Civil Procedure. Thereafter, by stipulation, said motion was heard as to the said complaint as amended and was granted by the court on the grounds of the statute of limitations as to the 1939 and 1940 crop years but was denied as to the 1941 crop year. The statute of limitations was suspended between Oct. 10, 1942 and June 30, 1946 by virtue of the amendment of 15 U.S.C. Sec. 16 passed Oct. 10, 1942 as amended June 30, 1945 (Acts of Congress, Oct. 10, 1942, Ch. 589, 56 Stat. 781; 59 Stat. 306; U.S.C.A. 1940 Ed. Supp. IV, p. 185; 15 U.S.C.A. 1949 Cumulative Annual Pocket Parts, Title 15, Sec. 16, p. 161.) The Evans suit was filed June 23, 1948.

The applicable statute of limitations was three years under Sec. 338, Subd. 1, Code of Civil Procedure of California, plus the period during which the statute was suspended as aforesaid, and the Evans suit was therefore barred as to any claims or cause of action arising prior to Oct. 3, 1941. The Evans cause of action for the 1939 and 1940 crop years arose prior to Oct. 3, 1941, and was therefore barred. The court, for that reason, on Nov. 22, 1948, granted defendant's motion to dismiss the Evans action as to the claims and causes of action in said Evans action No. 8353 for the years 1939 and 1940 and denied it as to the year 1941. The Evans action 8353 was tried as to the year 1941 only, but action 4643 was tried as to the years 1939, 1940 and 1941. Action 4643 was commenced on July 30, 1945. The statute of limitations in said action 4643 was suspended at that time pursuant to said statute as amended, and had been suspended continuously from Oct. [387] 10, 1942 up to said date and had run in said action 4643 less than the statutory period as to each of the years 1939, 1940 and 1941 which ended July 31, 1940, July 31, 1941 and July 31, 1942 respectively.

The amended complaint in action 4643, as amended, contained three counts, the first being upon the Sherman Act, and the second and third being for an accounting. Plaintiffs stipulated that if judgment were rendered in their favor upon the first count, that the second and third counts would be *functo officio* and would not be pressed. Action 4643 was tried only on the first count or cause of action thereof as amended. Evidence both oral and docu-

mentary and various stipulations were received in evidence, and the parties having presented written briefs to the court, and the matter being duly submitted to court, and the court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Court finds that:

(A) In these findings and in the conclusions of law, defendant American Crystal Sugar Company will be called "Crystal", plaintiff Mandeville Island Farms, Inc. will be called "Mandeville", plaintiff R. C. Zuckerman will be called "Zuckerman", plaintiff G. K. Evans will be called "Evans", Spreckels Sugar Company will be called "Spreckels", Holly Sugar Corporation will be called "Holly", and Union Sugar Company will be called "Union."

(B) A crop year as referred to herein and in the conclusions of law, is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences. The word "year" as hereinafter used refers to the crop year herein described.

(C) Certain stipulations of facts were entered into in writing [388] between the parties and received in evidence by and considered by the court. The court finds as true the facts stipulated to therein. The Court also finds as true the allegations of the amended complaint as amended in case 4643 and the complaint as amended in action 8353, admitted

by or not denied by the answer or amended answer thereto.

1. The grounds upon which the jurisdiction of the court depends are: this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States (15 U.S.C.A. Sec. 15), and brought in a district in which the defendant is found and has an agent.

2. (a) Plaintiff Mandeville now is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in Stockton, San Joaquin County, California.

(b) Defendant Crystal now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent designated for service of process under and by virtue of the law of the State of California regarding foreign corporations is J. W. Rooney, of Oxnard, Ventura

County, in the above entitled district and division of California.

(c) Plaintiffs Zuckerman and Evans now are and at all [389] times herein mentioned have been citizens and inhabitants of the State of California and residents of San Joaquin County in said State.

3. (a) Plaintiffs Mandeville, Zuckerman and Evans assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown in Contra Costa and San Joaquin Counties, California, north of the 36th parallel and in the delta of the San Joaquin River system.

(b) Mandeville Island at all times herein mentioned contained large areas of land suitable in composition, drainage, irrigation, location, climate and transportation facilities for the commercial raising of sugar beets suitable for processing into sugar. During the crop years 1939, 1940 and 1941 herein mentioned, plaintiffs Mandeville and Zuckerman had respectively supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the commercial raising on Mandeville Island of sugar beets suitable for processing into sugar.

4. The matter in controversy in each suit herein exceeds, exclusive of the interest, costs and attorney fees, the sum of \$3,000.00.

5. On Sept. 11, 1939, the Second World War

broke out and thereafter and up to Dec. 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defense against its possible entry into said conflict. On Dec. 7, 1941 the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times herein mentioned from Sept. 11, 1939, the sugar beet industry was and now is one of [390] the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continued at the time of the filing of action 4643. The various steps involved in the production and sale of beet sugar in California during the years here involved, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, are as set forth in Exhibits A, B, C and D as hereinafter set forth in Par. 7-C.

6. (a) That portion of California north of the 36th parallel is hereinafter referred to as "Northern California." That portion of California south of the 36th parallel is hereinafter referred to as "Southern California." A relatively few beet growers in California had farms slightly north of the 36th parallel and these were considered by the beet sugar refiners as being in Southern California, despite the fact that their farms were geographically slightly north of

said parallel and they are herein considered as owning and operating farms and producing sugar beets in Southern California. During the crop years 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including portions of Northern California, Southern California, Utah, Colorado, Michigan, Idaho, Illinois and other states, were planted to sugar beets. Said sugar beets, when [391] harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and upon being harvested were delivered to these manufacturers and taken to the latter's beet sugar refineries where the sugar beets were manufactured by an elaborate process into sugar by said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

✓ (b) From 1937 to 1942 inclusive, there were only four manufacturers owning or operating factories that manufactured sugar beets into sugar in California, to wit, Spreckels, Holly, Crystal and Union, although a fifth company, Los Alamitos Sugar Company, (hereinafter called "Alamitos") signed contracts with growers in Southern California. It did not own or operate its own plant. All of Spreckels'

California factories were north of the 36th parallel; all of Union's factories in California were south of the 36th parallel; Holly and Crystal each had factories both north and south of said 36th parallel. The only practical market available to growers of sugar beets in Northern California during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a given crop year, even if the necessary material and equipment priorities could be secured. During all of said period [392] said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and the only practical market available to growers of sugar beets in Northern California, during said period, was sale to one of said manufacturers. A like monopoly was held by Crystal, Holly, Union and Alamitos in Southern California during the said period.]

(c) The sugar manufactured from said beets was, during all of said period, sold in interstate commerce throughout the United States. The beets, however,

including the beets purchased from plaintiffs during 1939, 1940 and 1941, all as hereinafter found, were planted, grown, harvested and processed into sugar wholly within the State of California.

(d) After sugar had or has been produced from sugar beets, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States, or beet sugar refined in one refinery from that refined in another refinery.

(e) During said period, the only sugar beet seeds commercially available in California were those securable from one of said manufacturers and the only method of sale of marketable sugar beets available to growers of sugar beets in California was by sale to one of the said manufacturers under standard form printed contracts prepared by the manufacturers, whereby the price to be paid by the manufacturers to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets.

7. (A) In and by said standard contract, the grower [393] agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to culti-

vate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacturer of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured sugar in interstate commerce.

(B) The contracts that were used in California during the years 1937 to 1942, were often called the "50-50" contracts. They were based upon a formula which was supposed to provide for the retention by the company of approximately one-half (50%) of the net return of the sale of the sugar produced from said beets and payment of approximately one-half (50%) of said net return to the grower, as the purchase price of the beets.

(C) Attached to the amended complaint in action 4643 as Exhibits A, B, C and D are true copies of Crystal's Northern California contracts for 1938,

1939, 1940 and 1941. Attached to the Amendment to Answer to First Amended Complaint, as amended, in action 4643 as Exhibits 1 to 19, are true copies of the contracts of Holly, Union, Alamitos and Crystal in force in [394] Southern California during the crop years 1939, 1940 and 1941 during the respective years and by the respective companies designated in said respective contracts.

8. Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured sugar in Northern California was determined under the various contracts by the net return from the sale of sugar manufactured in the beet sugar factory or factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. Exhibit "A" to the amended complaint in action 4643 is a copy of the standard Crystal Northern California contract for the crop year 1938. But during the crop years 1939, 1940, 1941 and pursuant to the conspiracy herein-after referred to, the standard printed contract as used by all of said manufacturers in Northern California, provided that the net return used as a basis for the prices to be paid the grower was the average net return of all refineries manufacturing beet sugar north of the 36th parallel in California and not the net return of the particular manufacturer or particular refiners with whom the grower contracted and to whom the beets were delivered and by whom

or which the beets were manufactured into sugar. During the years 1939, 1940 and 1941, all growers of sugar beets in California were paid upon an average net return basis. During said years growers in Southern California were paid on the average net return of the Southern California factories and growers in Northern California were paid on the average net return of Northern California factories. While contracts in different areas of California differed in the schedules used, they all had substantially the same terms and within a given area in California, all growers during 1939, 1940 and 1941 were paid during said years, the same price for beets of a given sugar content, regardless of [395] with which company the grower dealt or where their beets were manufactured into sugar.

9. Some time in 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, but which defendant did not disclose to the plaintiffs or to the court, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel, to monopolize and restrain trade and to unlawfully fix prices to be paid the growers of sugar beets, and, as a part of said conspiracy, said defendant and said two other manufacturers (Holly and Spreckels) agreed among themselves to do and did among other things during the crop years 1939, 1940 and 1941, the following:

(a) Each no longer competed against any of the

others as to the price to be paid the growers for sugar beets raised in Northern California;

(b) Each paid the same price to growers of sugar beets in Northern California, to-wit: the price determined upon the average net returns from the sale of all sugar sold in interstate commerce from the factories of said conspirators north of the 36th parallel in California during that crop year and did not pay the growers upon the net returns from the sale of sugar sold from the Northern California factory or factories of the particular manufacturer to whom the particular grower was under contract;

(c) Each no longer competed with the others, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organizations of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, or by any particular manufacturer, paid all growers of sugar beets in Northern California the same price [396] for the same amount of beets of the same sugar content. A similar method of paying growers on an average net return was used throughout Southern California during the same period;

(d) They did not pay the growers of sugar beets a reasonable price for their beets. Each of said conspirators sold seeds to, entered into contracts with and bought beets only from growers who signed a standard printed form of contract prepared by said manufacturers and practically identical in all material terms. Farmers contemplating or desirous of

growing sugar beets in Northern California either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a practical market to sell their marketable beets. A similar method was used during said years throughout Southern California;

(e) Said prices agreed upon by defendant and its conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in Northern California during said period, are set forth in said Exhibits "B", "C" and "D" and were and are not the reasonable prices for sugar beets.

10. Prior to the 1939 crop season, the various manufacturers of sugar in Northern California, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease sales expenses and to operate as efficiently as possible in order to increase the unit return to growers of sugar beets under said standard contract and thus to attract beet growers to sign contracts with them. During the crop year of 1938, the net receipts of sales of sugar (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant per 100 pounds were greater than the average net receipts of the other manufacturers of beet sugar in Northern California. As a result thereof, during the crop year 1938, sugar beet growers in Northern California, north of the [397] 36th parallel, who had contracted with defendant, received on the average

from 28 cents to 50 cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of beets of identical sugar content delivered to the other manufacturers of beet sugar in Northern California.

11. During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer competition between the conspirators as had previously existed in their purchase of sugar beets.

12. As a direct, expected and planned result of said conspiracy, the free and natural flow in the purchase of sugar beets was intentionally hindered and obstructed. As a further direct, expected and planned result of said conspiracy, said three manufacturers operated, in so far as the growers' returns were concerned, as if they were one corporation owning and controlling all sugar beet factories in Northern California but with three completely separate overheads and selling expenses.

13. Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract. Defendant [398] Crystal has made payments for 1939, 1940 and 1941 beets to growers only in accordance with the method agreed upon by said conspirators as above set forth.

14. On December 2, 1940, Secretary of Agriculture of the United States, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations

duly made, did, pursuant to Section 301d of said Sugar Act (7 U.S.C. 1131 (d)), make the determination of the fair and reasonable price for the 1940 and 1941 crops of sugar as set forth in par. XIV of the amended complaint. Defendant took part in said hearings held by the Secretary of Agriculture, and knew of the determination, but persisted thereafter in said conspiracy and would not buy beets from growers in Northern California except under the terms and conditions set forth in said standard agreement.

15. On November 14, 1938, defendant and plaintiff Mandeville entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25 per cent from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar.

16. On Dec. 29, 1939, defendant and plaintiff Mandeville entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on Aug. 31, 1941 for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 [399] tons of sugar beets

of an average sugar content of 15.55 per cent from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar.

17. (A) On June 23, 1941 defendant and plaintiff Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay plaintiff on Aug. 31, 1942 for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47 per cent from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant.

(B) Plaintiff Evans, and defendant, on Dec. 23, 1940, entered into defendant's standard form contract for the 1941 crop season. Attached to the Evans complaint in action 8353 as Exhibit "D" is a true and correct copy of said contract. Plaintiff Evans performed each and every term, condition and covenant on his part to be performed in said contract and delivered to defendant 4,401.7 tons of beets thereunder, yielding 17.53 per cent sugar, which beets were accepted by defendant and manufactured by it into sugar. Said contract covered Camps 5, 6 and 7 of American Island, Contra Costa County, California, which at all times herein mentioned were areas of land located in Northern California, suitable in composition, drainage, irrigation, location,

climate and transportation facilities for the commercial raising of sugar beets suitable for processing into sugar. At all times herein mentioned said plaintiff had supplies, equipment, tools, personnel, labor, organization and knowledge adequate for the commercial raising on said areas of sugar beets suitable for processing into raw sugar. [400]

18. (A) Defendant during the crop years 1939, 1940 and 1941, operated sugar factories in Clarksburg (Northern California), Oxnard, Ventura County (Southern California), in the Arkansas Valley in Colorado, and elsewhere in other states of the United States. Sales of all of such sugar were directed by the President of the company during said three-year period from the head office at Denver, Colorado. Holly also operated sugar factories in Northern California, Southern California and in the Arkansas Valley in Colorado. During said crop years, 1939 to 1941, pursuant to said agreements made between them, Holly and Crystal paid their growers upon a joint net return basis. In Northern California and in Southern California the joint net return included all of the manufacturers of sugar within said respective areas; but in the Arkansas Valley it included two of the three manufacturers there located (Holly and Crystal) and did not include the third factory there located, the one operated by National Sugar Manufacturing Company.

(B) Substantial quantities of beets produced by plaintiff as aforesaid and delivered to defendant in said years, were by defendant shipped to defendant's sugar factory in Southern California, located at Ox-

nard where said beets were manufactured into sugar by defendant. Said beets, when they reached the said Southern California factory of defendant at Oxnard, were mingled with beets raised by various Southern California growers and manufactured into sugar and it was, and at all times it has been impossible to differentiate the sugar manufactured from plaintiffs' beets from that manufactured from beets grown in Southern California.

(C) The reasonable prices for the sugar beets delivered by the plaintiffs to defendants for the years here involved were:

1. For the crop year 1939, [401] \$15,749.51 more than Mandeville received from Crystal.

2. For the crop year 1940, \$14,321.61 more than Mandeville received from Crystal.

3. For the crop year 1941, not less than \$3,528.00 more than Zuckerman received from Crystal; and \$1,100.00 more than Evans received from Crystal.

(D) Had it not been for said plan and conspiracy and if plaintiffs had received the reasonable value of their sugar beets in a market unfettered and unhampered by said combination, plan and conspiracy, Mandeville Island Farms, Inc. would have received \$30,071.12 more and plaintiff Roscoe C. Zuckerman would have received \$3,528.00 more and plaintiff Evans would have received \$1,100.00 more than each did receive under said contracts and each of said plaintiffs respectively sustained damages accordingly, none of which damages have been paid. These

amounts as found herein are on the conservative side.

19. By reason of the foregoing acts of the defendant and its said conspirators, the price of sugar beets was illegally fixed, and an illegal monopoly was established, to the damage of plaintiffs as aforesaid.

20. Plaintiffs, in order to enforce their rights against the defendant, employed the services of attorneys at law, and, under the anti-trust laws of the United States (15 U.S.C., Sec. 15), are entitled to reasonable attorney fees. The reasonable value [402] of the attorney fees performed up to the time of the judgment herein is \$25,000.00.

21. From Oct. 10, 1942 to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendments of 15 U.S.C. Sec. 16, passed on Oct. 10, 1942, and amendments thereto (Acts of Congress Oct. 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV. p. 185; U.S.C.A. 1844 Cum, An. P.P. Title 15, Sec. 16, p. 76), which was in full force and effect between Oct. 10, 1942 and June 30, 1945.

22. (a) With reference to action 4643, the amended complaint, and the first count of the amended complaint as amended by "Amendment to First Amended Complaint" and the first count of the amended complaint as amended by said amendment and as further amended by "Amendment to

First Amended Complaint", each state a claim upon which relief can be granted for the years 1939, 1940 and 1941.

(b) With reference to action 8353, the complaint and the complaint as amended by "Amendment to Complaint" and the complaint as so amended and as further amended by "Amendment to Complaint" filed Mar. 1, 1949, each state a claim upon which relief can be granted for the year 1941.

23. It is not true that any of the claims, causes of action and demands of Mandeville for 1939 and 1940, or Zuckerman or Evans for 1941, hereinabove set forth, are barred by the provisions of Subd. 1 of Sec. 337 of the Code of Civil Procedure of California, nor by the provisions of Sec. 343 of said code, nor by the provisions of Subd. 1 of Sec. 338 of said code, nor by the provisions of Subd. 4 of Sec. 338 of said code, nor by the provisions of Subd. 1 of Sec. 339 of said code, nor by the provisions of Subd. 1 of Sec. 340 of said code.

24. It is not true that the defense of *pari delicto* is [403] applicable to any of the plaintiffs herein. It is not true that any of the plaintiffs herein aided or abetted in the consummation of the combination and conspiracy hereinabove referred to or knowingly participated therein. None of the plaintiffs was a party of the said monopoly, combination or conspiracy. None of the plaintiffs was in *pari delicto* with the defendant or any of the other conspirators. Plaintiff accepted and signed the joint return contracts for 1939, 1940 and 1941 for the reason that otherwise they could not secure sugar beet seed or

sell their beets or engage in the business of growing sugar beets at a profit. Each of them entered into said contract because of a business necessity. None of them knowingly or wilfully helped to build up the said monopoly. The plaintiffs were members of a class for whose protection the said statute was enacted. Mandeville entered into a contract with Crystal in 1937 for the 1938 crop at a time when Crystal was not a party to any illegal agreement or monopoly in restraint of trade. Mandeville had purchased Mandeville Island from Empire Farms Co., which had previously sold beets to Crystal. Crystal owned a beet dump on Mandeville Island which is geographically an island and there was no other beet dump on Mandeville Island. As a result of a flood, Mandeville's 1938 crop was destroyed, leaving Mandeville indebted to Crystal in a large sum of money which was secured by a crop mortgage not only on that crop but also on crops thereafter grown until the debt was paid off. Mandeville continued to be indebted to Crystal from that time until 1944 and was indebted to Crystal at all times during the conspiracy. Evans had also dealt with Crystal prior to the conspiracy and was indebted to Crystal at all times during the conspiracy. Furthermore, Evans was a tenant of Crystal and could not have dealt with either of the other two refiners.

25. At no time have plaintiffs or any of them abandoned, waived, released, surrendered or given up in any way any of their claims or causes of action hereinabove set forth, nor have plaintiffs or any of them intended so to do. [404]

CONCLUSIONS OF LAW

From the findings of fact hereinabove set forth, the Court herein makes the following Conclusions of Law relative thereto:

1. All conclusions of law that are set forth in the findings of fact are incorporated by reference herein as though here set forth in full.

2. This Court has jurisdiction of the parties and of the subject matter.

3. Prior to the crop year 1939, defendant wrongfully and unlawfully entered into, and during the crop years 1939, 1940 and 1941 remained and operated under, a combination and conspiracy which was in restraint of trade and commerce among the several states and wrongfully and unlawfully conspired with other persons to monopolize part of the trade and commerce among the several states, in violation of and contrary to the Sherman Anti-Trust Act of the United States (26 Stat. 209, 38 Stat. 731, 15 U.S.C. Secs. 1, 2, 7, 15) and did and performed acts forbidden by said Act. Plaintiffs are persons injured in their businesses and property by said acts of defendant by reason of the defendants doing said things forbidden by said Act. These conclusions of law are in accordance with the law as held by the decision of the Supreme Court of the United States heretofore made in the *Mandeville* case No. 4643 (334 U. S. 219), which decision is binding upon this Court.

4. Plaintiffs were injured and damaged in their

businesses by reason of said matters forbidden in the anti-trust law in the following sums:

Mandeville, for the years 1939 and 1940—\$30,071.12.

Zuckerman for the year 1940—\$3,528.00.

Evans, for the year 1941—\$1,100.00.

5. Plaintiffs are entitled to recover three-fold the [405] said damages suffered by them, together with costs of suit and reasonable attorney fees.

6. Plaintiffs' said causes of action are not barred by any statute of limitations. The cause of action of Evans for 1939 and 1940 crop years was barred by the statute of limitations but are not included in the above damages.

7. Plaintiffs are not in *pari delicto* with the defendant.

8. Judgment should be entered herein in favor of plaintiff Mandeville Island Farms, Inc. against defendant American Crystal Sugar Company in the sum of \$90,213.36, together with costs of suit; in favor of plaintiff Roscoe C. Zuckerman in the sum of \$10,584.00, together with costs of suit; in favor of plaintiff G. K. Evans in the sum of \$3,300.00, together with costs of suit; and in favor of plaintiffs Mandeville Island Farms, Inc., Roscoe C. Zuckerman and G. K. Evans in the sum of \$25,000.00 at attorneys fees.

9. The second and third counts in the action 4643 should be dismissed without prejudice.

Dated: February 26, 1951.

/s/ BEN HARRISON,

United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed February 26, 1951. [406]

In the District Court of the United States
Southern District of California
Central Division

No. 4643—BH

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Defendant.

No. 8353—BH

G. K. EVANS,

Plaintiff,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Defendant.

JUDGMENT

The above cases having been consolidated for trial upon stipulation of the parties and having been

regularly tried before the Honorable Benjamin Harrison, United States District Judge, a jury having been waived by all parties and the court [408] having heretofore filed Findings of Fact and Conclusions of Law and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that plaintiff Mandeville Island Farms, Inc., a corporation, recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$90,213.36; that plaintiff Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$10,584.00 and that plaintiff G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$3,300.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman and G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$25,000.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, for their costs herein in the sum of \$1,107.11; that plaintiff G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, for his costs herein amounting to \$35.00.

It Is Further Ordered, Adjudged and Decreed

that the second and third counts in action No. 4643-BH are dismissed without prejudice.

It Is So Ordered.

Dated: February 26, 1951.

/s/ BEN HARRISON,
United States District Judge.

Approved as to form:

O'MELVENY & MYERS,
DONALD S. GRAHAM,
PIERCE WORKS,
JOHN WHYTE,
Attorneys for Defendant.

Judgment entered Feb. 27, 1951.

Acknowledgment of Service attached.

[Endorsed]: Filed February 26, 1951. [409]

[Title of District Court and Causes—4643-8353.]

NOTICE OF MOTION TO AMEND
FINDINGS

To Plaintiffs in the Above-Entitled Consolidated
Actions and Their Counsel of Record:

Notice Is Hereby Given that defendant above named will, on March 19, 1951, at the hour of 10 o'clock a.m., or as soon thereafter as counsel may be heard, move the above-entitled Court [411] in the

courtroom of the Honorable Ben Harrison, Judge Presiding, for an order amending the findings of fact heretofore filed herein by striking from Finding 18D the following, appearing at page 17, lines 10-12 of the Findings of Fact and Conclusions of Law on file:

“if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said combination and conspiracy, and”.

Said motion will be made on the ground that the foregoing language is at variance with the theory upon which the case was decided by the Court, is contrary to the evidence, is irrelevant to the findings as to damage of which it constitutes a part, amounts to a finding, express or implied, upon an issue as to which the Court intended to make no finding, and, it is respectfully suggested, may have been made through inadvertence.

Dated: March 7, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,

Attorneys for Defendant.

Memorandum of Points and Authorities:

F.R.C.P. 52(b). [413]

[Endorsed]: Filed March 7, 1951. [413]

Acknowledgment of Service attached.

[Title of District Court and Causes—4643-8353.]

ORDER AMENDING FINDINGS OF FACT

Defendant above named having heretofore noticed its motion to amend Findings, and said motion having come on for hearing as noticed and having been heard, argued and submitted for decision, now, therefore, good cause appearing: [426]

It Is Ordered that said motion be, and the same hereby is granted, and the Findings of Fact heretofore filed herein be, and the same hereby are amended by striking from Finding 18D, the following appearing at page 17, lines 10-12 of the Findings of Fact and Conclusions of Law on file:

“if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said combination and conspiracy, and”;

and the Clerk is hereby ordered and directed physically to delete the said stricken matter from the said Findings of Fact and Conclusions of Law.

Dated: March 19, 1951.

/s/ BEN HARRISON,
Judge.

Approved as to form pursuant to Rule 7.

Dated: March 19, 1951.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS

/s/ By STANLEY M. ARNDT.

[Endorsed]: Filed March 19, 1951. [427]

[Title of District Court and Causes—4643-8353.]

NOTICE OF APPEAL

Notice Is Given that defendant above named, American Crystal Sugar Company, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the following portion of [428] that certain judgment heretofore and on or about February 27, 1951, entered in the above-entitled action, to wit:

“It Is Ordered, Adjudged and Decreed that plaintiff Mandeville Island Farms, Inc., a corporation, recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$90,213.36; that plaintiff Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$10,584.00 and that plaintiff G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$3,300.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman and G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$25,000.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, for their costs herein in the sum of \$1,107.11; that plaintiff G. K. Evans recover judgment against de-

fendant American Crystal Sugar Company, a corporation, for his costs herein amounting to \$35.00.”

Dated: March 28, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,

/s/ By PIERCE WORKS,
Attorneys for defendant, American Crystal Sugar
Company.

Acknowledgment of Service attached.

[Endorsed]: Filed March 28, 1951. [429]

[Title of District Court and Causes—4643-8353.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Defendant and appellant American Crystal Sugar Company hereby designates for inclusion in the record on appeal herein the complete record and all the proceedings and evidence in the above-entitled consolidated actions, including the reporter's transcript of the evidence and proceedings therein already on [431] file; and further

Requests that the original papers be transmitted by the Clerk to the United States Court of Appeals for the Ninth Circuit, all as provided in Federal Rules of Civil Procedure 75(o) and in Rule 11(1) of said Court of Appeals; and further

Requests that said Clerk prepare and furnish for use upon the appeal, an index of said record and

papers as prepared for transmittal to said Court of Appeals.

Dated: April 5, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for said defendant
and appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed April 5, 1951. [432]

[Title of District Court and Causes—4643-8353.]

STIPULATION RE FILING AND DOCKET-
ING OF RECORD ON APPEAL—
(Rule 73(g).)

An appeal and cross appeal having been taken to specified portions of the judgment heretofore entered herein;

It Is Hereby Stipulated that the time for filing and docketing the record on appeal herein may be extended to and including May 26, 1951.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
/s/ By STANLEY M. ARNDT,
Attorneys for plaintiffs and
appellants.

O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for defendant and
appellee.

It Is So Ordered.

This 7th day of May, 1951.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed May 7, 1951. [440]

[Title of District Court and Causes—4643-8353.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Califor-

nia, do hereby certify that the foregoing pages numbered from 1 to 440, inclusive, contain the original Complaint; Notice of Motion to Dismiss or in the Alternative to Strike From Complaint or For a More Definite Statement or for a Bill of Particulars; Stipulation and Order Filed November 26, 1945; Amended Complaint; Notice of Motion to Dismiss or in the Alternative to Strike from Amended Complaint; Order Granting Motion to Dismiss and Judgment of Dismissal; Amendment to Amended Complaint; Mandate of the United States Supreme Court; Answer; Amendment to First Amended Complaint; Amendment to Amendment to First Amended Complaint; Amendment to Answer to First Amended Complaint as Amended; Notice of Motion of Plaintiff to Strike Portions of Plaintiffs' Complaint as Amended; Coordination of Amended Complaint as Amended and Statement of Allegations of Amended Complaint as Amended that are Admitted by the Answer as Amended, all in case No. 4643-BH; Complaint; Notice of Motions to Dismiss and to Strike from Complaint; Amendment to Complaint; Memorandum; Answer; Amendment to Complaint; Amendment to Answer to Complaint as Amended; and Amendment to Answer, all in case No. 8353-BH; Pre-Trial Stipulation and Stipulation of Facts; Amendment to Answer as Amended; Additional Stipulation as to Facts; Stipulation as to Additional Facts; Stipulation as to Certain Facts; Memorandum Opinion; Defendant's Objections to Proposed Findings of Fact and Conclusions of Law Prepared by Plaintiffs; Objections to Second Draft of Plain-

tiffs' Proposed Findings of Fact, Conclusions of Law and Judgment; Objections to Third Draft of Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and Suggestions as to Amendments; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion to Amend Findings; Affidavit of Stanley M. Arndt in Opposition to Motion of Defendant to Amend Findings; Order Amending Findings of Fact; Notice of Appeal; Designation of Contents of Record on Appeal; Notice of Cross-Appeal; Designation of Record by Cross-Appellants and Stipulation and Order re Filing and Docketing of Record on Appeal and a full, true and correct copy of minute orders entered July 12, 1948, January 9, 1950 and February 21, 1950 which, together with reporter's transcripts of proceedings on November 13, 1945, February 21, 23, and 24, 1950 and March 19, 1951 and original plaintiffs' exhibits 24 to 44, inclusive, and original defendant's exhibits A to K, inclusive, transmitted herewith, constitute the record on appeal and cross-appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.00 which sum has been paid one-half by the appellant and one-half by the cross-appellants.

Witness my hand and the seal of said District Court this 21st day of May, A.D. 1951.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States for the
Southern District of California, Central Division

No. 4643-BH—Civil

Honorable Ben Harrison, Judge Presiding.

MANDEVILLE ISLAND FARMS, INC., a corpo-
ration, and ROSCOE C. ZUCKERMAN,
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY,
a corporation,
Defendant.

Appearances:

For the Plaintiffs:

MESSRS. WOOD, CRUMP, ROGERS &
ARNDT,
By STANLEY ARNDT, Esquire.

For the Defendant:

O'MELVENY & MYERS, and PIERCE
WORKS, and JOHN WHYTE, Esquire,
By JOHN WHYTE, Esquire. [1*]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, November 13, 1945, 10:00 a.m.

The Court: You may proceed.

The Clerk: 4643-BH, Civil, Mandeville Island

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Farms and others versus American Crystal Sugar Company.

Motion of defendant to dismiss or in the alternative to strike from the complaint, or for a more definite statement or for a bill of particulars, pursuant to notice, motion, and points and authorities.

Mr. Arndt: The plaintiff is ready.

Mr. Whyte: The defendant is ready.

The Court: You may proceed.

Mr. Whyte: If the court please, this is a motion to dismiss, or in the alternative to strike from the complaint——

The Court: I have read the pleadings and have spent about two weeks studying this matter. I will not need a statement as to what is contained in your pleadings.

Mr. Whyte: I assume your Honor has read our points and authorities. I don't know how Mr. Arndt feels about it, but our position is set forth in our points and authorities and are just as I would present them to your Honor orally.

The Court: I would like a discussion with you gentlemen as to several points that I have in mind.

As I read the pleadings generally, they cover really two points. There are two points involved. One [2] concerns itself with the Anti-Trust Act and secondly there is an accounting question. And it seems that those two questions are split up into four causes of action.

One question I have in mind is whether your first cause of action, in using the language that you do, it might be subject to what in State practice would be called a general demurrer.

But regardless of that I think we should look at

this case from a practical point of view. What is best for the parties?

It is quite apparent to me from a reading of the pleadings that the question is whether a beet grower who enters into an agreement with a sugar refinery whereby the sugar refinery agrees to pay the current price for beets is a basis for the payment of beets by the other refineries in this particular area. The area is described as being north of the 36th parallel.

I want to say frankly, gentlemen, as I understand the claim of the plaintiffs that by reason of the growing of beets and agreeing to sell them to the refinery, brings the case within the purview of the Anti-Trust Act.

The pleadings here use some very broad language. They speak of the transportation of beets and sugar in interstate commerce.

I assume the evidence will show that beets were [3] sold to the sugar refinery and were processed and the sugar then entered into interstate commerce.

Mr. Arndt: I don't think we allege the beets themselves were in interstate commerce.

Mr. Whyte: Yes, you do. I assumed that was an oversight.

The Court: There is some language with reference to sugar and sugar beets in the complaint. I believe it is on page 7:

“* * * unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states * * *.”

Mr. Arndt: We do not allege, your Honor, that the beets themselves were physically transported. It

is our contention that under the decisions the entire situation was interstate commerce. We do not claim that there was a physical transportation of the beets over state lines.

The Court: I feel, however, that that allegation precludes the court from making a ruling.

I felt that if this complaint could be made clear in that respect and the contracts pleaded that a ruling would enable counsel to appeal the case without too much cost.

I want to say frankly that I feel this is not an interstate commerce case. I have spent some two weeks [4] studying it and I have a number of my own authorities. I have examined those authorities and I feel if this first cause of action could be ruled on with the contracts and the pleadings in proper shape, that it would be an inexpensive matter to appeal and determine whether or not I am wrong.

On the other hand, if the case should be tried it would be a very expensive matter.

You cited the *Apex Hosiery Company vs. Leader*, 310 U. S., page 502. I think you will find that page 512 contains much stronger language. But neither of you have cited the case of *Parker vs. Brown*, 317 U. S., page 341, which went up from this district. While it is not an anti-trust case it involved the question of whether or not raisins before entering into interstate commerce were to be classified as coming within the purview of the Interstate Commerce Act.

Of course that involved a state regulation. That case was tried by a three-judge court and a decision was had with Judge Yankwich dissenting and the Supreme Court agreed with Judge Yankwich in that case.

In reading these cases they almost create a state of confusion because where state regulations are concerned the courts are not inclined to assume jurisdiction but yet in anti-trust cases they are. There is one case that is probably not controlling but it is persuasive, and that is [5] an Alabama case in 127 Southern. I feel very strongly that as a trial court it is not my function to expand upon the meaning of interstate commerce. I think that is a problem for the appellate court and really the Supreme Court.

It seems there is no end of reading when you start examining these various cases, but I haven't found anything that makes me feel that an agricultural product enters into interstate commerce by reason of being delivered to a processor that is engaged in interstate commerce and who processes that particular agricultural commodity. I can understand the differentiation in wheat cases, where the wheat simply is purchased in interstate commerce and moves in its present form. It was, however, rather hard for me to understand the raisin case because raisins are delivered to the processor who finally enters them into the stream of interstate commerce. They don't change their form any. But here we have sugar beets that are completely changed. Only a very small percentage of the beet eventually enters into and becomes sugar. I believe in this particular case it is between 16 and 17 per cent.

Now, the contracts or portions of the contracts are pleaded in your motion to dismiss. You set them forth and indicate that I could use those contracts in passing upon this motion.

Mr. Whyte: I wasn't sure, your Honor. Those authorities [6] did give some indication of it.

The Court: But they weren't very convincing to me and I felt I should let counsel take their choice on that—that is, if you wanted to build up an expensive record in view of the court's attitude in the matter or wanted to get this thing in shape so it would be squarely before the reviewing court on the pleadings. In other words, I do not want to cause you unnecessary expense.

And there is another question that has occurred to me. Why aren't these growers co-conspirators also? They entered into a contract and the terms of the contract are clear. They agreed to all these things. Why aren't they co-conspirators?

Mr. Arndt: They knew nothing about the conspiracy, your Honor. We discovered it years afterward.

The Court: The contracts indicate a conspiracy to control the price of beets. It indicates that all the growers in that area received the same price for their beets.

Mr. Arndt: May I give your Honor this example? Suppose that all of the dealers in a given manufactured product—say all second-hand car dealers in California got together and they said or agreed not to pay more than X dollars for such and such a car and Y dollars for this car and Z dollars for that car; and they agreed that if they sell they would only sell them at certain prices. [7]

Mr. Jones wants to sell his car. He either has to sell it to one of these dealers or he can't sell it at all. Is he a co-conspirator? And are these beet growers that have no other place to sell except to one of these three people conspirators? They are helpless.

The Court: They are not helpless because they entered into this agreement before they planted their beets. In other words, they entered into an agreement whereby the seed was to be furnished and specified the terms of the sale. They recognized that north of the 36th parallel they were to receive the current market price. In substance what that means is the current market price that the other refineries in that area paid.

Now, they knew when they signed that agreement that they were going to receive the average price that the other refineries received. Now, why aren't they co-conspirators? That is just a question that occurred to me when reading that agreement. In reading the agreement it certainly makes the court feel that there was in fact an agreement between the sugar refineries of that area to pay a certain price for the beets. And it is also clear that the beet growers agreed to accept such a price. Now, why aren't they a part of it?

Mr. Arndt: I refer your Honor to the Bausch & Lomb Optical Company case, 321 U. S. 707. In that case, your [8] Honor, the Bausch & Lomb Company made the individual dealers in each state agree they would only sell under certain conditions and they either had to sell under those conditions or they couldn't get the lenses. Well, the individual dealers were not guilty of any conspiracy.

The Court: You have a different situation there. There is nothing here to indicate there wasn't free competition as far as the sale of this sugar was concerned. Any suppression of competition was suppression between the three refineries in the amount that they would pay the beet growers.

The beet growers depended upon their product, a root product, a bulb, and shipped them to the refinery, the refinery processed them and passed the finished product into the stream of interstate commerce.

Now, if the plaintiffs in this case were not a party to the agreement the sugar refineries could not have operated.

Mr. Arndt: Let me give you another example.

The Court: Just a moment. I have not followed that thought through nor attempted to. I just thought I would call counsel's attention to it because it was rather intriguing to me. I have thought about it over the weekend and it just occurred to me that they were all parties to it. There is only one refinery named as a defendant, when [9] as a matter of fact all three of them should have been joined as defendants.

Mr. Arndt: I have cases on that.

The Court: They were all co-conspirators and each liable if they had been named as defendants. You could have brought them all in just as easily as you could have brought one. I have brought up the question as to whether or not these beet growers are parties to the conspiracy to give you something to think about. I am just throwing that out to you as a thought and if it becomes necessary I will be glad to have you gentlemen spend your time briefing it. I have spent all the time I could on the question, and even before I left for the North and since returning, and to me it was a very interesting and intriguing proposition.

Mr. Arndt: May I be heard briefly on the two points your Honor raises?

The Court: Certainly.

Mr. Arndt: Let us take the grocery case. The exact argument was made there involving the wholesale grocers association operating in Southern California and Northern California. The exact argument was made as is here being presented by your Honor.

There they said the retail grocers only sold here locally—only sold in California; that the product they sold was sold by them at retail to the ultimate consumer. [10]

There was nothing sold in interstate commerce but the Circuit Court held you cannot separate, you cannot take an isolated portion of an industry. The particular groceries came to these grocery men through interstate commerce and because it came to them through interstate commerce the sale of the groceries to the ultimate consumer was in interstate commerce. They said you could not isolate one item and not consider the others.

I cannot see how you can possibly reconcile that decision with the thoughts that your Honor has given us here, because the difference between the raisin growers case and this is a very simple one.

Here the contract provides that the sale is not consummated until the product is sold, the raw sugar is sold, and the raw sugar is sold in interstate commerce. Therefore, the activities in interstate commerce are a part of the very contract itself. Until the sale is made in interstate commerce we don't know what the grower is going to get, so to say we can separate—we can throw out of the contract the portion that provides for the price, is to take a part

of the contract away that is an essential part of the contract.

We have alleged in our complaint that prior to 1939 the method of sale—how it was done. And we have alleged that they joined together to change this method of [11] sale.

Now, the various other cases that we have cited from the United States Supreme Court are all recent cases, and they all say that you cannot take one part of a transaction and separate it and say that because one act was done in interstate commerce—we have cited case after case, your Honor, in which that very argument was made as is being made here, that you could isolate one part of it and say that is not interstate commerce, because in each one of these cases you could isolate some transaction.

The court there said it couldn't be done and here is the vice of what has happened here. Prior to 1940—prior to 1939 the three companies competed in interstate commerce as to their sales organization. Each tried to make the most efficient sales, each tried to produce most efficiently for interstate commerce, but after the conspiracy and as a part thereof they ceased to compete with each other. They were not interested any more in competing as to the efficiency of their sales organization or anything else because they had this plan and conspiracy.

Interstate commerce was much more directly affected in this case than it was in the wholesale grocers case. In the wholesale grocers case there was only an indirect connection. Here there is a contractual connection with interstate commerce as provided by the very contract [12] itself.

Now, as to the second point your Honor raised. I

don't see how that is practical because we have a second count here which does state a cause of action.

The Court: I have been talking about the big issue in this case.

Mr. Arndt: But how can there be an appeal until the second count is determined? There can't be an appeal from an order on one count only.

The Court: I think it was Justice McKenna who said in effect:

"To carry your argument to its natural conclusion the Anti-Trust Act would cover everything."

Mr. Arndt: And that is what the Supreme Court has done.

The Court: It hasn't, as I view it, in light of the opinion in *Parker vs. Brown*.

While that was not an anti-trust case, it held that it hadn't entered into the stream of interstate commerce and therefore the state had jurisdiction.

I think it was Justice McKenna who said:

"There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and [13] that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected, and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such

products are not yet exports; nor are they in process of exportation; nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of there being intended for exportation, but taxed, without any discrimination, in the usual way and manner in which such property is taxed in the state.”

Mr. Arndt: That is correct, your Honor, but here we have a contract that provides that the purchase price is [14] determined by sales in interstate commerce.

The Court: But not of that sugar. It is of that season's sugar, as I understand it. I don't know anything about the sugar business and perhaps I will have an opportunity to learn something along those lines before we are through with this case. But as I understand it, they pay them not for the sugar received from those particular beets or the sale of that sugar, but rather from the current price of sugar.

Mr. Arndt: That is not exactly correct, your Honor.

Mr. Whyte: That is one of the points at issue under the contract as I understand your contention.

Mr. Arndt: The contracts prior to 1939 provided

that the price to be paid was the price to be paid for sugar manufactured by the particular processor.

Mr. Whyte: That isn't the way I read this contract.

Mr. Arndt: That is how it was prior to 1939. Then since 1939 it was the sugar manufactured in California, north of the 36th parallel—not the proceeds from any other sugar, but the proceeds from the sugar manufactured during that particular year. I want to read from the document——

Mr. Whyte: Sugar grown north of the 36th parallel and sold during the year?

Mr. Arndt: I will read from the first one—that is [15] the first one here:

“The price per ton shall be determined upon the average net returns received for sugar manufactured at beet sugar factories located in California north of the 36th parallel.”

That is 1939. That is the first one.

Mr. Whyte: Exhibit A, your Honor.

The Court: What paragraph are you reading from?

Mr. Arndt: 5.

The Court: “The price per ton for beets delivered hereunder to the company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of 12 months commencing August 1, 1939, and based upon the company's test of sugar content

of the individual grower's beets in accordance with the following schedule:"

Mr. Arndt: Yes, but the point I am making is that sugar manufactured in beet sugar factories located in California north of that parallel during the year.

The Court: Let me ask this question as a matter of general information. These beets are processed in the refineries and following that is the sugar immediately put [16] on the market?

Mr. Whyte: There is some lag, I suppose, according to supply and demand.

Mr. Arndt: In some years it is immediately sold and some years there is a carry-over. Right now there is a shortage and it is sold immediately.

In 1939, '40 and '41 there was an overproduction and it was not immediately sold. It is as counsel says, a question of supply and demand whether sold immediately or not sold immediately. As a matter of fact, I think the cause of our present lack of supply of sugar is due to these contracts.

Mr. Whyte: I don't suppose I have to answer such a remark as that.

The Court: Another case that I was interested in is 260 U. S. 245. I don't know whether this case was cited by either counsel. There is certain language in the case that I would like to read:

"We may, therefore, disregard the adventurous considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a State that have, or are destined to have, a market in

other states, are subjects of interstate commerce, though they have no moved from the place of their production or [17] preparation.

“The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet ‘on the hoof,’ wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to states other than those of their production.”

Mr. Whyte: And in our case you might say “seed as yet [18] unplanted”.

Mr. Arndt: But how can that be reconciled with the recent decision?

The Court: Gentlemen, if you can reconcile the decisions on this question you are more fortunate than I am. All I can do is follow what I consider to be the trend of these decisions. But I do not feel that it is my function to extend the rules as I now understand them. I feel that if they are to be expanded that is the function of the courts that have the final interpretation of these sections. I do not feel it is my function to legislate.

Mr. Whyte: Your Honor, under any theory there must be some allegation of facts and this complaint is absolutely barren of any allegation of fact——

The Court: You are not going to argue against me, are you?

Mr. Whyte: No, sir; I am trying to supplement your Honor's remarks to satisfy counsel here.

Mr. Arndt: May I read from some of these decisions again?

The Court: Well, I have read your cases, counsel, and I have probably given more time to this case, particularly on a motion to dismiss, than I have on any other case for a long time.

In the first place it was a new subject to me and [19] it was interesting. There is such a thing as convincing myself to the contrary, but at this time I am convinced that these beet growers are not entitled to protection under the Anti-Trust Act. I may be wrong. It won't be the first time I have been wrong, and it will probably not be the last time either. But I do feel that the pleadings without pleading the contracts and with this particular language in there, makes it difficult to dismiss in view of the

general language used and the liberality of pleadings under the Federal Rules of Civil Procedure.

Mr. Whyte. Doesn't your Honor have discretion to grant the motion with leave to amend?

The Court: I have had this rather frank, informal discussion with counsel to let them know what I have been thinking. I don't know how you gentlemen could approach the subject other than for me to sit here and listen. I was in hopes that counsel would see fit to amend the first cause of action so that we could get a definite ruling because if we try it and then I should rule as I do now you would be unable to prove that the beets went into interstate commerce and after going through all those preliminary steps and building up a record I don't know whether you would be any better off or not.

Mr. Arndt: Then how is it procedurally possible? Suppose I do amend and set forth the contracts? How is it [20] procedurally possible to have an appeal without a trial? I am not going to abandon my second count.

The Court: I am not asking you to abandon anything. I want you to understand I am only trying to be helpful. I want to try to decide this case correctly. At the same time I feel that if these matters could be reached and have a ruling on this question that it would save you both money because if the court rules with you on this first cause of action then the law of the case is going to be established and it would be settled. On the other hand, if we try it and build up a record and the court reverses it and sends it back for re-trial, you would have to go through the same

thing again. Now, we might do like we did in one other case we had. We might enter into—I don't know whether any statute of limitation is involved here.

Mr. Arndt: There is, your Honor. The statute will have passed ——

The Court: Has it run yet?

Mr. Whyte: That would be four years under Section 343.

Mr. Arndt: The statute has run on the first year. The statute has run on one of the years. In other words, the statute ran August 31st, that is my recollection, as to one count.

The Court: We had a case where that situation arose. Counsel had several causes of action and under a stipulation [21] and by agreement they dismissed their other causes of action and each party waived the statute of limitation and consented that a new suit be filed at any time within six months after a final determination of the case in the Circuit Court.

Oliver Clark and Lyons & Lyons entered into that agreement by stipulation whereby they could divide their cause of action by a stipulation and have a separate cause of action on the other points and try that.

Mr. Whyte: Counsel will be willing to stipulate to the status quo as to the date of the file as to any re-filing. I don't know what the date is.

Mr. Arndt: You didn't plead the statute of limitation in the second and third counts, so I assume you don't contend it was limited at that time.

Mr. Whyte: That is right. When was this action filed?

The Court: July 30th.

Mr. Whyte: We would be willing to so stipulate.

Mr. Arndt: There would have to be a contract authorized by a Board of Directors of the corporation. I don't think attorneys have a right to —

The Court: If we continue the matter for a week and you gentlemen discuss it you might arrive at some agreement.

Mr. Whyte: We are glad to do that. You [22] might file two lawsuits if you want to and we will protect you on the statute.

The Court: One has already run in the meantime.

Mr. Whyte: I say we will protect him on the statute back to the date when he filed.

The Court: It seems to me there should be a practical way to determine it because the real money involved is in the treble damage action. The rest of it involves an interpretation of the contract. The real thing involves money and that is under Count 1. It is that count that will make the growers feel good if they recover and the refiners feel bad if it goes in that direction.

Mr. Whyte: A lot of money is involved in that count.

The Court: I realize this is not an open and shut proposition. I realize it is a close case. It may be that the court will hold that I am wrong but I don't see why we should spend weeks in trying the case when the court feels it doesn't state a cause of action.

Mr. Arndt: There are certain advantages in what Your Honor says and I will endeavor to work out

something along that line. I appreciate Your Honor's suggestion.

The Court: If it simply goes up on the pleadings it would be a very inexpensive appeal. If it goes up on a record of days and days of transcript it would be very expensive. [23]

Mr. Whyte: We would be happy to work out something along the line of Your Honor's suggestion.

The Court: I would be interested in any authorities you gentlemen might have on the thoughts I have expressed.

Mr. Whyte: Your Honor may rest assured we will explore that subject further.

Mr. Arndt: I would be very much interested in hearing certain judges of the United States discuss the question of the farmer being a conspirator with a sugar company.

The Court: If this were a criminal case, gentlemen, and they were named as defendants they would be held liable as conspirators. It is true the farmer is a little fellow in the picture, but in this case, considering the amount of beets that they sold, they weren't so small. The sales ran into a lot of money and it wasn't a matter of an individual growing beets on a half acre of ground. He was in the business in a big way and your evidence of conspiracy is going to be this contract itself—at least part of it as to establishing a conspiracy, and all the parties that entered into that contract have the appearance to me of being co-conspirators.

Now, it may be that I have gotten (having tried

so many conspiracy cases) an obsession on the subject, but they seem to bring everything in but the kitchen sink when they try a conspiracy case. I don't know how a man who [24] sells \$100,000 worth of beets in one year can say that he was blameless, particularly when he entered into an agreement before the crop was planted. If they had forced him into some agreement before he had his beets growing and forced him to take their own price that would be different.

Mr. Arndt: I can allege that for one year that happened—those are the facts. For one of the years the beet contracts were signed after the beets were planted.

The Court: I want to say that the thing that bothered me most on this question, was the wording of the contract and it represents to me the closest point—the contract providing for the payment out of the sale of sugar, that represents a very, very close question and for a while I felt that the interstate commerce started with the beets and that it was a continuous movement by reason of that contract. However, I have come to a different conclusion.

Mr. Arndt: Without that there would be no case.

The Court: Well, there might have been an oral contract and they might have been paid on that basis.

Mr. Arndt: When I use the word "contract" I mean either oral or written. I mean without that being in the contract. That is what differentiates it from the other cases.

The Court: That is the thing that bothered me for so long before I finally came to a different con-

clusion. There are two or three cases here that are about as near on all [25] fours as you can get them.

Mr. Arndt: On both sides.

The Court: Yes, on both sides. And that is what makes a lawsuit. If it was all one-sided you wouldn't be here. There is enough involved to try it out.

I will continue this matter until next Monday, November 19, at ten o'clock, or any other date that is agreeable.

Mr. Arndt: May we fix it for eleven o'clock that day? I have a matter in the Superior Court at 9:30 which I would like to complete, and if we could meet here at eleven o'clock I would appreciate it.

The Court: Very well, I will take it up at eleven o'clock.

Mr. Arndt: And there will not be any argument at that time.

The Court: I will take it up at eleven o'clock. I have taken longer this morning with my calendar than I am accustomed to, but I wanted to discuss this case with you gentlemen after reading your briefs. I think you can see that I have been interested in the case.

Mr. Whyte: We certainly appreciate Your Honor's interest in it.

The Court: I don't know whether that can be said by counsel on the other side. [26]

Mr. Arndt: I think I made that statement a few moments ago.

Mr. Whyte: Thank you very much, Your Honor.

The Court: Very well, we will stand in recess until two o'clock.

Whereupon, at 12:00 o'clock noon, the above entitled matter was concluded.)

[Endorsed]: Filed Sept. 13, 1948.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California,
Tuesday, February 21, 1950, 10:00 a.m.

The Court: You may proceed.

The Clerk: No. 4643-Civil, Mandeville Island Farms, Inc., a corporation and Roscoe C. Zucker-
man, plaintiffs, versus American Crystal Sugar Com-
pany, a corporation, and No. 8353-Civil, G. K. Evans,
plaintiff, versus American Crystal Sugar Company,
a corporation, consolidated for trial.

Mr. Arndt: The plaintiff is ready.

Mr. Works: Ready, Your Honor.

The Court: The clerk just called my attention to
the fact that he doesn't believe the record shows
these two cases have been formally consolidated.

Mr. Arndt: That is correct; and at this time I
move for such consolidation.

Mr. Works: We join in the motion to consolidate
for the purpose of the trial.

The Court: It will be so ordered.

Mr. Works: May I take up one or two prelimi-
nary matters, Your Honor?

The Court: Yes.

Mr. Works: At the last hearing Your Honor gave
us permission to amend the answer in each case to
plead the defense of *pari delicto*.

At that time the choice was given whether to do it that [4] way or to amend to conform with the proof. Mr. Arndt wanted us to complete it so I have served these two amendments and may I now have leave to file them?

The Court: They may be filed.

Mr. Works: In looking over the files I notice there is an ambiguity in the pre-trial stipulation of facts which Mr. Arndt and I have agreed may be corrected. On page 9, Your Honor, paragraphs 30 and 31, Your Honor will note that there is a table in each of those paragraphs. One of them, paragraph 30, relates to the joint net returns and that is expressed in cents. Paragraph 31 refers to single net and that is expressed in dollars.

The point is that one is expressed in terms of a pound of sugar and the other in terms of 100 pounds and we would like to amend each of those paragraphs to make it clear that it refers to pounds of sugar and the expression should each be in cents.

The Court: Why don't you simply add "per pounds of sugar sold"?

Mr. Works: That is what I had in mind, Your Honor.

The Court: And the other is per hundredweight, is it?

Mr. Works: Well, I thought we might do this, say per pound in the other also and change the dollar mark to a cents sign because it amounts to the same thing.

The Court: I think you gentlemen can by [5] interlineation correct the original.

Mr. Works: If you will give us that permission we will do it during the recess.

The Court: Yes. The fact that paragraph 30 refers to the pound and the other per hundredweight is rather apparent.

Mr. Works: That is right. We wanted to be perfectly clear on that.

The Court: I don't know where you gentlemen are going to start in this case. I have been thinking about it. Your briefs filed over the week-end were filed while I was holding court in San Diego and I haven't had time to study them. However, I have lived with this case for so long and so many facts have come up and so many arguments have taken place that I now find myself more or less in a state of confusion and you gentlemen are going to have to clarify the atmosphere by a statement of the facts that you want to go into this morning so far as the evidence that you wish to introduce.

Mr. Arndt: If the court please, it is my thought to proceed as follows:

I have heretofore filed a document entitled "Coordination of Amended Complaints as Amended" which combines into one document the complaint and all the amendments and everything that has been stricken out.

That was filed prior to pre-trial and there has been no objection made as to that so I assume it is correct so far [6] as counsel is concerned.

Mr. Works: There are some inaccuracies, Mr. Arndt. I have in mind one in particular which relates

to our answer to paragraph 10 of your amended complaint with reference to our 1938 net.

That allegation was denied by an amendment to our answer and I notice your coordination shows it as admitted. If you will look at paragraph 10——

Mr. Arndt: I think we are referring to two different things. The coordination of amended complaints has nothing to do with the answer. That is the second amendment, the statement of allegations of the complaint that are admitted.

Mr. Works: Wherever you have it that allegation is denied.

Mr. Arndt: I haven't reached that stage yet.

Mr. Works: All right.

Mr. Arndt: The next document which I think is the one to which counsel refers, is a statement of allegations of amended complaint as amended that are admitted by the answer as amended.

I think that is the one that counsel has reference to.

Mr. Works: That one certainly is and I wasn't sure whether the matter was gone into in your other document or not.

Mr. Arndt: No. The first document merely sets forth [7] the complaints with the amendments and has nothing to do with the answer whatsoever.

Mr. Works: All right.

The Court: It is a compilation of the last five years' work, is that it?

Mr. Arndt: Instead of having to go through a half a dozen documents I have it all in one document. That was the sole purpose of that, your Honor.

The Court: That is what I assumed.

Mr. Arndt: The second is a statement of the allegations of the complaint as amended and admitted by the answer as amended.

This is the first time I am told it wasn't correct. Which particular paragraph are you referring to, counsel?

Mr. Works: Paragraph 10 which has reference to the 1938 net. We saw no occasion to question it at the time because it was not a document called for in the pre-trial order at all.

Mr. Arndt: That puts me in the position that I, not having received any objection to that, I have proceeded under the assumption that that particular matter was admitted and I have not produced here nor taken the deposition of the other companies to show their 1938 returns and those are the figures that are shown.

Mr. Works: Mr. Arndt, we have on file an answer denying [8] that allegation. That is all I can say. It has been there for months.

The Court: Gentlemen, let me say this. If either one of you finds yourself in difficulty because of a confusion in the pleadings in this case the court will give you an opportunity to develop any fact that should be before the court. For instance, under your stipulation of facts if you find you have made an error or there is an omission that is against interest and that you say you have made, the court will permit you to develop it. After all, the court only wants the facts. It has taken five or six years now and if it takes another five or six years it doesn't bother me.

Mr. Works: That is perfectly all right. I merely wanted to make the record clear.

Mr. Arndt: There has been presented one document entitled Stipulation of Facts which we hope to have for your Honor by this afternoon and a second document entitled Stipulation of Facts which stipulates as to certain additional facts not included in this stipulation owing to the fact that some of the records are in Denver and some in Clarksburg. We have been delayed in getting all of the data necessary for that particular stipulation but we hope to have it this afternoon.

Mr. Whyte: Yes.

The Court: Gentlemen, you have indicated here different interrogatories that are going to be [9] introduced.

Mr. Arndt: Yes, your Honor.

The Court: Only certain parts are to be introduced in evidence and I am wondering just what kind of record we are going to have when we get through if one of you desires to appeal this case.

Mr. Arndt: I intend to read each one of them in unless your Honor has some other suggestion. That is what I intended to do. I thought that would take up all morning.

The Court: That is satisfactory to me. I am a good listener.

Mr. Arndt: I would first offer the stipulation of facts, which is the one that is dated January 4, 1950, and which accompanied the pre-trial stipulation.

Mr. Works: We have reserved objections in the pre-trial stipulation to a number of the paragraphs.

In other words, we have stipulated to the facts, your Honor, but we have denied their materiality or relevancy in a number of instances.

I don't know how your Honor cares to proceed in a situation of this sort.

The Court: If you can tell me how I can proceed or how to proceed so as to keep the record clear I would be glad to have your aid.

I want to say frankly, on the different theories and the admissibility of evidence, I think the better way is to reserve your objections until the evidence is all in and I have had [10] an opportunity to study the record. Unless that is done I can't rule very intelligently.

Mr. Works: That is what I had in mind.

The Court: As a matter of fact when the Supreme Court gets through with the case, notwithstanding your opinion to the contrary, it isn't such a complicated picture as you may think. I think the difficulty in this case is going to be the establishing of damages. The Supreme Court has held such agreements constituted a violation of the Antitrust Act and your agreements were entered into and I think your stipulation shows that the entire state of California was covered between the different companies. [11]

The question then comes up, is the grower damaged.

I haven't read all of Mr. Arndt's statement that he filed the other day. He has a theory on the question of damages, and I don't know whether his theory is right, whether his attempt to establish damages is by a reasonable method. I don't know.

I am inclined to think, if there is any damage, the thing is to put in all the facts, and then we could let a jury figure it out of thin air and hope to have some basis for it. A jury doesn't have to have much basis, if they can show damages. In other words, it seems to me that is the real difficulty in this case, is to show there is any actual damage. There could be a conspiracy that could be to the advantage of these companies that wouldn't be to the disadvantage of the growers.

Mr. Works: It is a profit-sharing scheme, as far as that goes.

The Court: Whether or not there is any damage seems to me to be the really serious problem in this case. I think the rest of the maneuvers are more or less dressing up the lawsuit.

Of course, I realize that you don't agree with that entirely, but I felt as you did in the beginning of the case, that the Antitrust Act didn't cover it. The Supreme Court said I was wrong and you were wrong in your theory. That is [12] as far as the cause of action.

Mr. Works: Yes, they certainly held that. There is no question about it.

The Court: So that, really, if you want to get down to the gist of this, it is to determine whether or not the plaintiffs in this case have been damaged. Now, if they can't establish any damages, then they are going to have to refer back to their accounting in the case, and I think there are certain features of this case that have to be taken into consideration in fixing and indicating a violation of the Antitrust Act

that really come under the accounting. I think some of these by-products that were available to one plant and were not available to the Oxnard plant, and they haven't received credit for it that they claim, that all comes under the accounting angle of it, as I view it.

But the most serious angle of this case is determining the damages, if any, and the most serious part is the trebling of the damages.

Mr. Works: That is what you might call the painful part. your Honor, I wonder if it would help if I were to state our position.

The Court: I would like to have that.

Mr. Works: I have here a copy of the Supreme Court's decision, and there are certain parts of it to which I would like to refer. [13]

First, as to the effect of that decision, as we all know, that case went up on a motion to dismiss, and for the purpose of that motion all of the facts alleged in the complaint had to be taken as true. At that time no answer had been filed. Since then an answer has been filed, and it has put in issue practically all of the material allegations of the complaint as amended.

As your Honor observed a moment ago, what the court held was that that complaint stated a cause of action, and it held it upon the basis of the facts alleged in that complaint, because each and every one and all of them had to be taken as true for the purpose of that motion. That is shown very clearly—

The Court: I realize that. As I view the decision, it in effect held anything that had to do with sugar

was interstate commerce. That is the ultimate effect of it. In other words, it is like oil. You might be drilling an oil well and hit a dry hole, and yet the contractor that is drilling for oil and hits a dry hole comes under interstate commerce, because it affects interstate commerce. It is about the same thing here. That makes it come within the purview of interstate commerce, because it is an extension of it.

Mr. Works: They so held because that is what the complaint alleged in terms, that there had been a restraint upon interstate commerce, and Mr. Justice Rutledge at page 246 of [14] the opinion said the only interstate product was sugar and therefore they had alleged a restraint upon the sugar. They had to take that fact as true, because it was alleged, and for the purpose of the motion it had to be taken as true.

The Court: You may refresh my mind, counsel, but I thought the complaint as amended and finally passed on deleted the sugar and dealt with the sugar beets.

Mr. Works: So did we, and that whole question was argued in Washington, and Mr. Justice Rutledge, with all respect, wrote his way around that situation. That was one thing that Mr. Justice Jackson did point out. Let me read a portion of that to you, if I may, your Honor.

The Court: Of course, I have read a good many other cases since then, so I can always have my mind refreshed.

Mr. Works: Your Honor will recall that there was a situation whereby you indicated you felt this question should be tested.

The Court: I felt that when they used the word "sugar," that would apply.

Mr. Works: Exactly.

The Court: And I felt that if it dealt with beets that had not been processed into sugar, that was a different matter, and they amended the complaint so as to make an inexpensive method of determining the issue of whether that complaint was good. [15]

Mr. Works: And that question, your Honor, was never decided on this appeal, and I will show you why, if I may refer to the opinion. Reading from page 244, if I may:

"Respondent"—that is ourselves—"has presented its argument as if the amended complaint omitted all reference to restraint or effects upon interstate trade in sugar and confined these allegations to the trade in beets. It is true that at the hearing which followed filing of the amended complaint, petitioners at one point, apparently in response to some intimation from the court, eliminated the words 'sugar and sugar beets' from one of the allegations that the refiners had conspired to 'monopolize and restrain trade and commerce among the several states. . . .'

"Respondent takes this elision"—this elimination of the words sugar and sugar beets—"as effective to constitute an express disavowal by petitioners of any charge of restraint of trade in sugar, the only interstate commodity. The amendment did not eliminate or affect numerous other allegations which in effect repeated the charge in various forms and

with reference to various specific effects upon interstate as well as local phases of the commerce. Some of these explicitly specify trade or commerce in sugar, others designated the trade affected as interstate, which on the facts could mean only sugar. Moreover, petitioners deny the disavowal, both in intent and in effect. They say the elision [16] was insubstantial, since in the clause from which it was made the allegation of conspiracy to monopolize and restrain interstate commerce remained, and the only interstate trade was in sugar."

Your Honor gave us a quick appeal on that question, and the question never was decided for the reasons stated here.

"We think the amendment, for whatever reason made, was not effective to constitute a disavowal, disclaimer, or waiver." [16a]

Now, Mr. Justice Jackson got the point and so did Mr. Justice Frankfurter. I know a dissenting opinion is only a dissenting opinion, but they laid out the situation exactly as we thought it was when your Honor made the suggestion with respect to testing the question as to whether a restraint on beets alone would be a violation of the Sherman Act.

The Court: Of course, I wouldn't have granted the motion to dismiss if I had considered it as including sugar.

Mr. Works: Exactly. We knew that.

The Court: And, as a matter of fact, I told you gentlemen so.

Mr. Works: We knew that.

The Court: I figured that the effect of the decision was to hold, like in the milk cases, they were simply bringing the industry within the purview of the Antitrust Act.

Mr. Works: At any rate, the case was decided by the Supreme Court upon the basis of a charge that interstate commerce in sugar was restrained. That is what it holds. Or, rather, that the complaint stated a cause of action.

May I continue merely stating our contention?

The Court: Yes.

Mr. Works: The court does indicate that it is necessary to make out a cause of action under the Sherman Act: First, that you must show a combination; second, and this is important here, and this is the place where I think we should make [17] our position very clear, you must show that that combination had a substantial effect on interstate commerce, because the Supreme Court indicated that is still the law; and the third, of course, is that you must show damage resulting from such a combination to a reasonably certain extent.

The Court: Let me ask you this. You said the first was that there was a conspiracy in restraint of trade.

Mr. Works: There must be a conspiracy or combination first; two, it must have a substantial effect upon interstate commerce, and, three, it must cause damage to the parties in a reasonable certain extent.

The Court: Take the first one.

Mr. Works: I am going to be frank about that, your Honor. I think we cannot dispute the proposition that your Honor right now has a right to infer

from these cropping contracts that there had been a combination or an agreement between the three manufacturers to use a joint or common or multiple price determination factor in arriving at the price of sugar beets. I can't be any less frank than that. But there still remains to be proven two things, granted such a combination, as we all know the beets never get out of the state.

Question No. 2 is, did that combination—I am not going to use the opprobrious term of conspiracy, inasmuch as I am very frankly telling your Honor what I think you can infer [18] from the contracts themselves—did such a combination or such an agreement with reference to the sugar produce a substantial economic effect upon interstate commerce? That question still remains to be proven by the plaintiffs in this case.

The Court: Now, why don't you be just as frank in that respect, counsel?

Mr. Works: I would be happy to.

The Court: That under your theory, if I happen to have five acres of beets, then I would never have any remedy, because I couldn't prove that that had a substantial effect. You could make any kind of a conspiracy to prevent me from getting a fair price for my beets, and yet that wouldn't have any substantial effect. The amounts involved here are substantial.

Mr. Works: Certainly, your Honor, they are.

The Court: So that is the reason I think it resolves itself down to a question of whether or not, if there hadn't been any of this arrangement, whatever you call it—you don't want to call it con-

spiracy, you don't want to be charged with being a conspirator—but whether or not this arrangement resulted in the growers getting a less price for the beets than they otherwise would have gotten.

Mr. Works: We haven't got to that yet. Your Honor says "substantial." It is substantial dollar-wise, according to [19] claims of the plaintiff, but we don't think it is. However, the substantial thing must be the effect upon interstate commerce. Whether you have five acres or whether you have 100,000 acres, whether you are running a little farm or whether you are running the King Ranch down in Texas, you are not within the purview of the Sherman Act unless what you do in conjunction with others has a substantial effect upon interstate commerce.

You say there is no remedy. About 47 of the 48 states, I think, have their own anti-monopoly statutes where interstate commerce is not an ingredient at all. The plaintiff isn't remedyless. I can't do any more than quote to you from what the Supreme Court said as to the three ingredients of these things.

The Court: I realize what the ingredients are, the things they have to prove, at least I think I do, but I don't see how you can claim that the arrangements had here in California did not have a substantial effect upon interstate commerce. I am frank to say the problem—I may be wrong, and I am just talking and letting you know what I am thinking—

Mr. Works: That's all I am doing, your Honor.

The Court: The problem that concerns me in this is how a person is going to be able to prove what the damage was.

Mr. Works: That is the third ingredient. [20]
That problem is with us.

The Court: I know there is that problem. You can have all the theories you want, but you still have to convince the trier of the facts that you have been damaged.

Mr. Works: That is right.

The Court: I think I might make a finding this did have a substantial effect on interstate commerce and then it would be back in your lap as quickly as before.

Mr. Works: That is possible, your Honor. All I am saying is the burden is on them to prove it.

The Court: I realize that the burden is upon them to prove that.

Mr. Works: On the appeal, it stood admitted, because that was a motion to dismiss.

The Court: I realize the difference. I am sorry I did not go ahead and try the case at the time. I thought I was deciding a point of law and we would get a ruling on it.

Mr. Works: But we haven't got it.

The Court: And that that would save everybody expense, because I realize that after you get through one of these cases, it makes it so expensive that sometimes it denies a person the right to appeal. In other words, I felt this way, that the plaintiff was in a position, if I had tried the case, because of the expense of the record—I don't know who they are or anything about them—it would have made them [21] think twice before they would have appealed because of the expense involved in the preparation of the

record being so great. That is the thought I had in mind.

Of course, I did not know what way the case would go, but the way I was thinking at that time, particularly in view of the Supreme Court's ruling on the raisin case at Fresno, that they probably would get all the evidence in and I would still rule as I had before, as I figured the law in my own mind, and it might have deprived them of the right of an appeal because the expense was so great.

Mr. Works: Well, we wanted to have a quick decision of the question, too.

Our views as to damages may be expressed rather briefly. If there is anything, you Honor, that sticks out all over this picture as the result of the, let us say combination or whatever you want to call it, it was simply one thing. It changed the price determination factor from the single net which had been used in previous years, to a joint three-party average or a multiple net, if you want to use that term. There is no question but what that was, we say, the only result, but under any concept, it was the primary result.

The Court: If I remember correctly, the plaintiff's contention in that respect is that breakdown of competition would require less efficiency.

Mr. Works: I will get to that, your Honor. I say even [22] from his own standpoint, the primary result was the switch from the single to the multiple net. We have stipulated here as to what the single net was for these three years, the Clarksburg single net, so, prima facie, without going into these other elements, their damages can be measured mathemati-

cally by applying the differential between the single net and multiple net for the very years in question, 1939, 1940, and 1941.

If they want to go ahead and show other damage, show lack of efficiency and what-not, as they charge, they certainly have that privilege, but I say to you, if I may, that their prima facie damage is the difference between the single and the multiple net for these three years.

Now, if they say our operations were inefficient and, contrary to all human experience, we are trying to lose money instead of make it, they may prove that, if they can, and then they may prove, if they can, what the result was.

They were growing for us. Your Honor knows this sugar setup. It was a profit-sharing proposition, pure and simple. We would sell the sugar, figure the net return, and they would get a certain percentage of what we got. They were in the same boat we were. If we made money, then they made money. If we lost money, then they would lose money. I am talking about the single net now.

So I say in a situation of this sort, it is [23] utterly improper—I am again stating our position—to go into other years, such as the plaintiff seeks to do by four different methods so far. He wants to use 1937, 1938 and 1942 figures to determine damages for 1939, 1940, and 1941, but his damages for 1939, 1940, and 1941 can be shown arithmetically by the difference between the single and multiple net for those three years.

The Court: The only thing is, counsel, don't you

think that the factors that entered into the prices for the various comparative years you are seeking to use should be considered? What I mean is, you say that they have nothing to do with it, but I am here trying this case and that is part of his theory. I have always believed in trying a case, particularly without a jury, that each man should have an opportunity to put in his theory of the case.

Mr. Works: We are not going to object to it, your Honor.

The Court: For instance, if there is a difference in the price, then I think you ought to be in a position to show why.

Mr. Works: Exactly. We are not going to object to his going into these other years.

The Court: In other words, there may be factors which should also be taken into consideration. I can very readily see that a 1942 factor would hardly be fair because then you [24] are getting into the war period. I presume it would depend a whole lot on the price of sugar during those periods and, after all, it depends on his theory for damages, as I understand it to be, which is that that plan or the plans as a whole resulted in a lower price for beets than he would have received if those beets had been put through the plant for which he had a definite contract. What do you call that one, Clarksburg?

Mr. Works: The Clarksburg plant is the one which bought the plaintiff's beets, yes.

The Court: As I recall the statement the other day, that was the normal place for those beets to be processed.

Mr. Works: I don't know of what importance Oxnard is in the plaintiff's theory now, but what I was talking about was simply our views as to their going into other years when you have definite data as to the years in question.

Now, your Honor, if you will look at these cases where you have a situation where somebody is out of business for a given year, like in the Story Parchment case, where the effect of the combination was to put it out of business, he didn't do any business after that, so he didn't have any figures for the years the conspiracy was in operation.

The Court: I haven't read the plaintiff's brief. It was just filed the other day. It came in and I saw it. I saw it yesterday morning, but I haven't had an opportunity to study it. [25]

Now what I want to do is get this case boiled down to what the factual situation is, and then you gentlemen can brief it. [26]

Mr. Works: That is fine.

The Court: And I hope we can get this record in such shape that a reviewing court will have something intelligible before it.

Mr. Works: I am sure we will all cooperate to that end, your Honor. May I make a statement off the record. It has nothing to do with the issues.

The Court: Off the record.

(Discussion had off the record.)

Mr. Arndt: If the court please, I cannot permit counsel's statement regarding the Supreme Court decision to go uncontradicted. It is so completely in

error and so completely omits what the Supreme Court actually stated.

I am reading from the official decision that I received from the clerk of the court. I am reading at page 15. The court says:

“It is clear that the agreement is the sort of combination condemned by the Act even though the price fixing was by purchasers and the persons especially injured under the treble damage claim are sellers, not customers or consumer. And even if it is assumed that the final air of the conspiracy was control of the local sugar beet market it does not follow and is outside the scope of the Sherman Act.”

Now, I will read from the next page, page 16. [27]

The Court: Just a moment, Mr. Arndt. I take the position at this time in approaching this case that it comes within the purview of the Antitrust Act and I am going to receive evidence on that basis and when we get through then I am going to give counsel an opportunity to file in the form of briefs anything that they desire.

Mr. Arndt: Then as to counsel's statements regarding a profit-sharing plan, everybody was in the same boat. The evidence is going to show one very interesting thing and I think I should call it to your Honor's attention as a sort of opening statement in view of the statement made by Mr. Works, and that is this.

During these years, 1939, 1940, 1941 and particularly in 1939 and 1940, substantial portions of the sugar was not sold during that particular crop year but was sold in the next crop year.

Instead of giving these plaintiffs the benefit of that the defendant took the entire benefit of the increase in price that occurred.

In the second place they shipped substantial portions of the sugar beets from the Clarksburg district to the Oxnard district and thereby taking it out of the overhead of the Clarksburg district and putting it into the overhead of the other district and the added price that was secured by Oxnard, because of the process they had called the Stephens process, [28] all went to the defendant. As a consequence the defendants have made hundreds of thousands of dollars over and above their share of the profits that they otherwise would have made and for them to say this is a profit-sharing plan and everybody is in the same boat——

The Court: Let me ask you this question. Doesn't that question come under your accounting count? In other words, suppose there hadn't been this so-called combination agreement that same practice could have been carried on, could it not? In other words, did the conspiracy have anything to do with that practice or enable them to carry on that practice?

Mr. Arndt: In the first place it enabled them to do so because we had no remedy. We had no one else we could go to. And in the second place it goes to the point that we must disregard their individual returns for 1939, 1940 and 1941 which Mr. Works wants to use as the basis for damages.

We cannot use those, first, because the entire contracts are invalid and everything connected with them and, secondly, because of these practices that they

used which rendered unfair and unjust the use of their individual net returns because of these practices.

The Court: But how are you going to draw the line between matters that may be considered as damages and those that may be considered under the accounting angle? [29]

Mr. Arndt: A lot of matters are pertinent to both, your Honor.

The Court: In other words, I believe you made the statement that a recovery on the case we are trying now—the feature of it we are trying now, if you prevailed in that then the other would fall.

Mr. Arndt: Yes, your Honor.

The Court: And if you failed in this you could still go ahead with your accounting feature.

Mr. Arndt: Yes, your Honor, and that was based upon my theory that the contracts are void.

The Court: I realize that.

Mr. Arndt: That is the theory.

The Court: The contracts are void and then you would be entitled to receive your reasonable value for the beets.

Mr. Arndt: That is right.

The Court: There is one matter that is not clear in my mind and that is, assume for instance that there had been no arrangement whereby you have no place to dispose of your beets, what did that have to do with their shifting the beets from Clarksburg to Oxnard or vice versa? In other words, they could have still gyped you on that basis according to your theory.

Mr. Arndt: They could still have, your Honor.

The Court: But would that have anything to do with the [30] combination feature of the case?

Mr. Arndt: Its importance is to show that we cannot accept Mr. Works' theory of damages because the net return, the individual net return of Crystal during those three years is impregnated with that practice—these two practices of carry-over and the shifting to Oxnard, thereby rendering the figures that they present useless as the basis of determining any reasonable value.

The Court: Let me see if I can state it and see if I have your point in mind. It is your theory that inasmuch as they intermingled, you might say, the refining of the sugar and the processing of the beets between the two refineries that there is no way to determine what was the proper amount you should have received from the beets at the Clarksburg refinery.

Mr. Arndt: I wouldn't say there is no way of doing it.

The Court: I mean with mathematical accuracy.

Mr. Arndt: I will say the Clarksburg figures are not accurate—to take the net Clarksburg figures are not accurate in view of what happened and we can't take the Clarksburg figures because of what happened.

The Court: It seems to me that would come under your accounting feature.

Mr. Arndt: Our problem here is to determine what was the reasonable price of beets during those three years at the [31] place of production in San Joaquin Valley, California.

Now Mr. Works says we should take the individual

net return under these contracts and that is the fair price. I say that is not the fair price, first, because the contracts are void and you can't use them at all and, secondly, even if the contracts were not void, regardless of that, the net was so figured by disregarding these two important elements that they do not reflect under any circumstances a fair price. And I will produce figures in evidence which will, I think, substantiate that from a third point of view.

For example, it is our contention and I think the evidence will show, that the conspiracy went much further than the mere fixing of the price on the growers; that the conspiracy went into the selling of the sugar itself and that under the method that sugar was sold the sales of sugar was based upon seaboard base points.

By doing that the amount of freight that was paid depended entirely upon the sales program of the company. If the company sold most of its sugar in the western states and little of it in the midwest or eastern states it would have a relatively lower cost of freight. If it sold more in the eastern seaboard states it would have a relatively higher cost of freight and the figures that we will present show this remarkable situation, that in 1938, which was the year before the conspiracy and in the year 1942, which was [32] the year after the conspiracy, the percentage that freight bore to gross sales price was practically the same. But during the period of conspiracy the freight jumped way up. Why did the freight jump way up? Because during that period they had some sort of an agreement among themselves to so handle their

sales that each would have approximately, as near as possible, the same freight charges because the freight charges were deducted in reaching the net.

So, we have the situation that in 1938, before the conspiracy, Crystal paid a certain price to the growers. The next year immediately there was a drop due primarily to the increase in freight.

During the three years there was this increase in freight as soon as the conspiracy ended the freight decreased again and the return to the growers increased again. In other words, that may be a mere coincidence but we feel that the figures that we will show will develop that to claim that that was a mere coincidence, happening both before and after the conspiracy——

The Court: Well, you are an optimist, Mr. Arndt. You are assuming that what you are discussing now was the only thing that had any bearing on the cause and effect.

Mr. Arndt: Well, I am certain the documents that will be presented in evidence will show and I will present a chart thereof to your Honor, the evidence here will clearly show [33] the situation the year before and the year after the conspiracy as compared to the three years of the conspiracy. And the situation regarding freight rates as shown by their own statements is such that it just couldn't be a mere coincidence and that taken in connection with the other testimony which we will develop that this entire plan of the joint return came from the sales department——sugar sales department and not from the production department and various other matters which we will

produce I think will draw the necessary influences, but I think this all started when I started to offer in evidence a stipulation of fact and then Mr. Works——

The Court: I think this has been an hour well spent, counsel, in trying to clarify the position of the parties. It has been helpful to the court.

I haven't looked upon it as being controversial in one sense. It has been more of an exposition of each one's position in the case.

Before we start to introduce your evidence I think we should take a five-minute recess and discontinue talking and get down to the meat of the case.

(Short recess.)

The Court: You may proceed, gentlemen.

Mr. Works: As I understand it, your Honor, as to these stipulations, all objections will be deemed reserved and we do not have to take up any time with them as we go along? [34]

The Court: I think that can be stipulated to.

Mr. Arndt: I will so stipulate. ..

Mr. Works: Yes. It will save a lot of time.

The Court: Did you make your corrections during the recess?

Mr. Works: I have them on my copy. I will do it now if that is agreeable.

Mr. Arndt: I was going to read it into the record.

The Court: You do not need to read the stipulation?

Mr. Arndt: Very well.

The Court: This is what you call your pre-trial stipulation?

Mr. Arndt: That is right.

Mr. Works: Yes, your Honor, the stipulation of facts and it is embodied in the pre-trial stipulation. I think it is the first document under the cover which is marked pre-trial stipulation.

The Court: Yes. Gentlemen, it seems to me the matter on page 9, paragraph 30 and 31, is so obvious it couldn't be misunderstood.

Mr. Works: We all understand it.

The Court: And in addition to that the record shows what it is if there is any dispute.

Mr. Works. All right.

Mr. Arndt: That is right. In other words, it is [35] formally stipulated.

Mr. Works: We should say this, that the cents and dollars in those two tables in paragraphs 30 and 31 should be viewed either as cents or dollars per pound or per hundred pounds.

Mr. Arndt: So stipulated.

The Court: Mr. Arndt, do you desire to have the stipulation deemed read and copied into the record by the reporter?

Mr. Arndt: Yes, your Honor, we can do that.

Mr. Works: Let us say then for the purpose of the daily, it will not be copied now but if there are any proceedings subsequently then in making up of the record the stipulation may be put in as if it had been a part of the transcript at the present time. Is that what you Honor has in mind?

The Court: No; he was going to read it into the

record. Apparently what he wants to do is build up his record now and of course if we build up the record now on any appeal in this case the record will not have to be rewritten, which would mean that the reporter would copy this into the record at this time. There is no occasion to take the time of the court to read this because I have already read it and we have discussed it many times. But as I understand it you are building up your record now so that it can be used on appeal by either side? [36]

Mr. Works: Yes, that is correct. I understand it now.

The Court: The record will show the stipulation of facts as having been read in court and will be copied by the reporter into the record.

Mr. Works: That is perfectly satisfactory. Then shall we do this? We will take the evidence and then I think the case, shall I say abstrusely as to the evidence, should perhaps be briefed when we get through. That would be our preference. There is so much evidence here that I don't think an oral argument would do it justice. I don't think in an oral argument we could do justice to our positions.

The Court: Gentlemen, I think both of you know I don't encourage oral argument because I can read better than I can listen. I am rather a poor listener.

Mr. Works: And I can write better than I can talk sometimes.

The Court: Except I have had an experience lately with reference to briefs when I thought I would have been better off if I had listened rather than tried

to read the books that have been submitted. There is no reflection on counsel present.

Mr. Works: I can't speak for Mr. Arndt but I believe in short briefs.

The Court: I have never seen a short brief yet.

Mr. Works: Well your Honor, I will try. [37]

The Court: Then as I understand it, Mr. Arndt, we are building up the record now so that the daily transcript when we are through, will be a record so it will not have to be rewritten in the event of anybody being dissatisfied and it is hard to realize that I can make any decision in this case without dissatisfying somebody.

Mr. Arndt: So far I haven't ordered a copy of the transcript daily, but under those circumstances I will have to order a copy of the transcript.

The Court: That is a matter for you gentlemen to determine. I am not encouraging you one way or the other, but I think we might as well face the facts in this case. This case is of such importance that whoever loses is going to appeal and then you are going to have to have a transcript.

Mr. Works: Either way is all right with me, your Honor. Of course if we were to make up a printed record and if this document were not copied into the transcript now it would have to be copied into it and set up for the printed transcript later on. Whether we do it now or later on is immaterial. It may be material to Mr. Arndt, but we have ordered a transcript and it makes no difference to us one way or the other.

Mr. Arndt: Off the record.

(Discussion off the record.)

The Court: Very well, the reporter will copy [38] the stipulation of facts into the record at this place.

(Following is the stipulation of facts:

“In the United States District Court for the
Southern District of California,
Central Division

No. 4643 BH

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Defendant.

No. 8353 BH

G. K. EVANS,
Plaintiff,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Defendant.

STIPULATION OF FACTS

Subject to such objections, reservations or limitations as are hereinafter specified by the respective parties hereto, it is stipulated that the following facts are true and may be taken by the court as true;

1. The farms operated by plaintiffs Mandeville Island Farms, Inc. and Roscoe C. Zuckerman during the 1939, 1940 and 1941 crop years and on which the sugar beets sold to [39] the defendant were grown, were located in San Joaquin County in Northern California. The farms operated by plaintiff G. K. Evans during said crop years and on which the sugar beets were sold to defendant were grown, were located in Contra Costa County in Northern California.

2. The only practicable market available to plaintiffs and other beet growers in California north of the 36th parallel and during the crop years 1938-1941 was sale to one or more of the companies having factories in California.

3. The factories referred to in paragraph 2, above, were owned and operated by Crystal, Spreckels and Holly in Northern California and by Holly, Crystal and Union in Southern California.

4. During the crop years 1937 and 1938, growers in California contracted with one or more of the companies referred to in paragraph 3, above, or with Los Alamitos Sugar Company to grow beets and to sell the entire crop of sugar beets covered by the particular contract to that contracting company, under a form of contract prepared by the particular contracting company.

5. The contracts in use during the crop years 1939, 1940 and 1941 in Northern California provided that the beet growers must plant, on the acreage contracted with a particular processor only seed furnished by that processor.

6. During the crop years 1937 and 1938 Crys-

tal [40] contracts for Northern California fixed the price of beets by a formula containing two variables: The processor's net returns (as the term was defined by the growers' contracts) per 100 lbs. of sugar received by Crystal from sugar manufactured at the Clarksburg factory and sold by Crystal during the 12 months period commencing August 1 of the crop year in question, and the sugar content of the beets grown by the particular grower determined according to Crystal's laboratory tests.

7. During the 1939, 1940 and 1941 crop years all of the processors who had factories in Northern California used a growers' contract under which the price to be paid for beets was determined by a formula in which one of the variables was the sugar content of the beets grown by the particular grower and the other was the average net returns (as that term was defined in the growers' contract) received for sugar manufactured at the beet sugar factories located in California north of the 36th parallel and sold during the period of 12 months commencing August 1st for the crop year in question.

8. The contract used by Crystal at its Clarksburg factory for the crop year 1941 was the last one in which the method of computing beet prices was based upon a formula which used as one variable the average net returns (as that term was defined in the pertinent growers' contract) received for [41] sugar manufactured at all beet sugar factories located in California north of the 36th parallel and sold during specified periods of time by said factories. In the crop year 1942 Crystal reverted to the type of contract

used by Crystal in the crop years 1937 and 1938 and described in paragraph 6, above.

9. Sugar beets were grown during the crop years 1938 to 1942 on large acreages in Northern California, Southern California, Utah, Colorado, Michigan and Idaho.

10. The sugar beets grown in California and Colorado during the crop years 1938 to 1942, when harvested, were not sold in central markets, as were potatoes, onions, corn, grain fruit and berries, but were produced by growers under contracts with processors, and, upon being harvested, were delivered to those processors and taken to their beet sugar factories where, by an elaborate process, sugar was extracted from the sugar beets.

11. Sugar beets, when harvested, are bulky and semi-perishable.

12. The sugar manufactured by Crystal at its Clarksburg factory, from beets grown in Northern California during the crop years 1940 and 1941, was sold both in interstate commerce and in intrastate commerce in California.

13. Prior to the crop year 1939, Crystal, Holly and Spreckels had competed with each other as to the performance, ability and efficiency of their manufacturing, sales and [42] executive departments, and each strove to increase sales returns and decrease expenses. (The defendant by stipulating to this does so without any implications or admission that in the crop years 1939, 1940 and 1941 it did not so compete.)

14. During the crop year 1942 the average net returns (as that term was defined in the 1942 Clarks-

burg factory growers' contract) from sales of sugar produced at Crystal's Clarksburg factory, and used by Crystal as one of the bases for payment to its growers in Northern California, was 4.246c.

15. During the crop years 1939, 1940 and 1941 Crystal, in purchasing beets from growers in California used three forms of contracts each cropping year. One of these forms provided for payment based in part upon the average net returns (as that term was defined in the growers' contract) received from sugar manufactured at all beet sugar factories located north of the 36th parallel in California and sold during the period of 12 months commencing August 1st of the crop year in question and two of them provided for payment based in part on the average net returns (as that term was defined in the growers' contracts) received from sugar manufactured at all beet sugar factories in Southern California, and sold during the period of twelve months commencing August 1 of the year in question.

16. The beet sugar factories located in [43] California north of the 36th parallel in the crop years 1939, 1940 and 1941 were owned and operated by Crystal, Holly and Spreckels. The beet sugar factories owned and operated in Southern California during said period were owned and operated by Holly, Union Sugar Company and Crystal.

17. Contracts in use in Southern California during the cropping years 1939, 1940 and 1941 referred to four southernmost sugar companies. These were Holly, Union, Crystal and Los Alamitos Sugar Company. However, Los Alamitos Sugar Company did

not operate a factory in Northern or Southern California during said crop years so that while there were four beet sugar companies operating in Southern California during the said crop years, there were only three factories operating.

18. Contracts used by Crystal, which during the crop years 1939, 1940 and 1941 provided for payment based upon a formula in which one of the variables was the average net returns (as that terms was defined in the growers' contract) received for sugar manufactured at all beet sugar factories located in California north of the 36th parallel and sold during the period of 12 months commencing August 1st of the crop year in question, were used during said years by Crystal for contracting with sugar beet growers in California growing beets in the delta or island region of the San Joaquin and Sacramento Rivers and where the delivery costs were less [44] to Clarksburg (where Crystal's Northern California factory was located) than to Oxnard (where Crystal's Southern California factory was located). Copies of these contracts are attached to the amended complaint herein as Exhibits B, C and D.

19. For growers of sugar beets located in the southern part of the San Joaquin Valley south of the delta or island region of the San Joaquin and Sacramento Rivers, Crystal used a form of contract in which payment to the growers of the beets was based upon a formula in which one variable was the average net returns (as that term was defined in the growers' contracts) received from sugar processed at all beet sugar factories in Southern California and sold dur-

ing the period of 12 months commencing August 1 of the crop year in question. Copies of such contracts for 1939, 1940 and 1941 are attached to 'Amendment to Answer to First Amended Complaint as Amended' in the case of Mandeville Island Farms v. American Crystal Sugar Company as Exhibits 15, 17 and 19.

20. The contracts entered into by Crystal with sugar beet growers in Southern California other than growers in the San Joaquin Valley, provided for payment based upon a formula in which one of the variables was the average net returns (as that term was defined in the growers' contracts) received by the four southernmost beet sugar companies in California for sugar manufactured in their Southern California [45] factories and sold during the period of 12 months commencing August 1st of the crop year in question. Copies of said contracts are attached to the above mentioned Amendment to Answer to First Amended Complaint in the above mentioned case as Exhibits 14, 16 and 18.

21. During the crop years 1939, 1940 and 1941 all freight for transporting sugar beets in California by Crystal on beets purchased by Crystal was paid for by Crystal regardless of the form of contract and regardless of the part of the state in which the beets were grown.

22. During the crop years 1939, 1940 and 1941, no sugar beets produced south of the 36th parallel and delivered to Crystal were shipped to the Clarksburg plant of Crystal for manufacturing, but some of the beets produced north of the 36th parallel and delivered to Crystal were shipped by Crystal to Oxnard

and there manufactured into sugar. All of the beets grown in the southern part of San Joaquin Valley on contracts of the type attached as Exhibits 15, 17 and 19 to the aforesaid Amendment to Answer to First Amended Complaint, as amended in the aforesaid action, were shipped to Oxnard.

23. The beets which were grown under Clarksburg contracts during the crop years 1939, 1940 and 1941 and which were shipped to Oxnard for processing, were mingled with beets delivered under Oxnard contracts (Exhibits 14, 15, 16, 17, 18 and 19, above mentioned), and their identity was lost. [46] Defendant can determine the tonnage of beets received and paid for from the San Joaquin-Sacramento delta and which were designated for shipment to Oxnard for processing into sugar during each of said years, but cannot determine the tonnage of such beets received at Oxnard or the amount of sugar produced therefrom.

24. In 1939 plaintiff Mandeville delivered 22,355.6 tons of sugar beets of 18.25% average sugar content to Crystal and 14,348 tons thereof were designated by Crystal for shipment to Oxnard to be processed into sugar. The rest were shipped to Clarksburg factory to be processed into sugar.

25. In 1940 plaintiff Mandeville delivered 25,430.3 tons of sugar beets of 15.55c average sugar content to Crystal and 13,167 tons thereof were designated by Crystal for shipment to Oxnard to be processed into sugar. The rest were shipped to Clarksburg factory to be processed into sugar.

26. In 1941 plaintiff Zuckerman delivered 14,144.7 tons of sugar beets of 15.47% average sugar content

to Crystal and 10,381 tons thereof were designated by Crystal for shipment to Oxnard to be processed into sugar. The rest were shipped to Clarksburg factory to be processed into sugar.

27. In 1941 Evans delivered 4,401.7 tons of beets to Crystal of an average sugar content of 17.53%. These beets were mingled with beets from other growers which were shipped to each factory. Of the mingled beets, some were shipped by [47] Crystal to Oxnard and some to Clarksburg, but defendant does not know and cannot ascertain how many.

28. The net returns (as that term was defined in the growers' contracts in use at Crystal's Oxnard factory for the crop years 1939, 1940 and 1941) from the sale of sugar manufactured at Crystal's Oxnard factory included the net returns from sugar produced from some of the beets grown by plaintiffs and manufactured at Oxnard, if such sugar was sold during the particular crop year. None of the net returns (as that term is defined in the growers' contracts in use at Crystal's Clarksburg factory for the crop seasons 1939, 1940 and 1941) from the sale of such sugar were included in the determination of the net returns used as one of the basis for the payment to plaintiffs for their sugar beets.

30. The average joint net returns for 1939, 1940 and 1941 under the operations of the sugar factories in California north of the 36th parallel and those in Southern California were as follows per pound of sugar sold:

Year	Northern California	Southern California
1939	3.131c	3.378c
1940	3.160c	3.398c
1941	3.950c	4.066c

31. The average single net returns to defendant Crystal for sugar manufactured at its Clarksburg factory and sold during the period of twelve months commencing on August 1 [48] of the years specified below, and computed in all other respects as were the Northern California average joint nets specified in paragraph 30 hereof, and computed in all respects as were the average single net returns for sugar so manufactured and sold during the crop years of 1937 and 1938, were as follows per pound of sugar sold:

Year	Clarksburg Single Net
1939	3.123c
1940	3.163c
1941	3.970c

all as reported by Crystal to the Sugar Division of the United States Department of Agriculture by reports dated, respectively, January 27, 1941; November 7, 1941; and November 25, 1942. Copies of said reports are attached as part of the answer of said defendant to Interrogatory No. 74 heretofore propounded by plaintiffs Mandeville and Zuckerman.

32. The Crystal-Oxnard contracts, copies of which are attached to said Amendment to Answer to First Amended Complaint as Amended in said action as Exhibits 14, 16 and 18, contain a different scale of beet prices than the scales used in the contracts for equivalent crop years signed by plaintiffs for beets of the same sugar content and for a given net return (as

that term was defined in the growers' contracts in question).

34. If beets of the same sugar quantity and content [49] as delivered by plaintiff had been delivered to Oxnard under Exhibits 14, 16, and 18 attached to said Amendment to Answer to First Amended Complaint as Amended in said action, plaintiffs would have received more than they did receive in the following sums:

a) Mandeville in 1939 would have received \$17,-892.18 more than it did;

b) Mandeville in 1940 would have received \$18,153.95 more than it did;

c) Zuckerman in 1941 would have received \$8,-757.98 more than he did;

d) Evans in 1941 would have received \$2,374.49 more than he did.

This item 34 assumes that all of each plaintiff's beets for the designated year which were contracted to Crystal would have been delivered to Crystal at its Oxnard factory under the designated contracts, and that the net returns (as that term was defined in each of said contracts) at the Oxnard factory for each designated year would not have been diminished by the additional sugar resulting from these additional deliveries—which is not admitted by defendant.

35. Certain beets were produced in Northern California by growers under contract to Crystal in the crop year 1941 and were delivered to Crystal in the crop year 1941 and manufactured into sugar in the crop year 1941. All of [50] the sugar so produced, however, was not sold in the crop year 1941. A portion of it was sold in the crop year 1942. As to the

portion sold in the crop year 1942, the funds received therefor were included in calculating the net returns which formed one of the bases for the payment for the 1942 crop beets, and such funds were not included in calculating the net returns which formed one of the basis for the payment for the 1941 crop beets.

36. Some molasses produced at Crystal's Clarksburg factory during the crop years 1939, 1940 and 1941 from the processing of sugar at Clarksburg was shipped by Crystal to the Oxnard factory during the crop years 1939, 1940 and 1941. This molasses was mixed at Oxnard with molasses produced at Oxnard in the manufacture of sugar. The mixed molasses was processed during the crop years 1939, 1940 and 1941 into sugar at the Oxnard plant. The sugar so manufactured was mingled with and could not be distinguished from and was sold with sugar manufactured direct from sugar beets at the Oxnard factory. The average net return which was used under the Southern California growers' contracts for the designated years as one of the bases of payment to growers for their beets reflected the funds received from sugar manufactured from such molasses and sold during the period specified in each of the said contracts.

37. During the crop years 1939, 1940 and 1941, certain byproducts resulted from the processing of beets into [51] sugar at both the Clarksburg and Oxnard factories of Crystal. These byproducts at the Clarksburg plant included molasses and pressed pulp; the byproducts of the Oxnard factory included molasses and dried pulp. Sales were made of these byproducts during each of the said crop years, but none of the funds received from said sales were in-

cluded in the determination of the 'average net return' as that term was used in the growers' contracts for the designated years. Some of the molasses produced at the Clarksburg factory was shipped to the Oxnard factory, where a process known at the Steffens process was used for the extraction of sugar from molasses. The Clarksburg factory did not have a Steffens plant. The Steffens process used at the Oxnard factory was used in extracting sugar from some of the molasses produced at the Clarksburg factory and shipped to Oxnard. The funds received from the sale of sugar so produced were included in the 'average net return' as that term was used in the growers' contracts entered into between Crystal and those growers who delivered beets under the Oxnard factory contracts for the designated years, but none of said funds were included in the determination of the said 'average net return' used as one of the bases of settlement with the growers who delivered beets under the Clarksburg factory contracts for the designated years.

38. During the crop years 1939 to 1941, both inclusive, three beet sugar factories were located [52] in the Arkansas Valley in Colorado, one of which was owned and operated by Crystal and was located at Rocky Ford, Colorado, one of which was owned and operated by Holly and which was located at Swink, about five or six miles from Rocky Ford, and one of which was owned and operated by the National Sugar Manufacturing Company and was located at Sugar City, about fifteen miles from Rocky Ford. During said crop years, both Crystal and Holly purchased beets from growers under a written contract, each of which written contracts provided that the price per

ton of beets to be paid the grower should be based on a formula, one of the variables of which was the average sugar content of the beets delivered under the contract, the other variable being the average net return, as that term was defined in each of the said contracts, received for sugar sold by the factories located in the Arkansas Valley in Colorado on the line of the Atchison, Topeka & Santa Fe Railway during the period of twelve months described in each contract. The factory of Holly at Swink, and the factory of Crystal at Rocky Ford, were the only sugar factories located in the Arkansas Valley in Colorado on the line of the Atchison, Topeka & Santa Fe Railway during said crop years.

Dated: January 4, 1950.”)

Mr. Arndt: We next desire to offer certain of the interrogatories and answers thereto.

Now as to those, your Honor, I assume the simplest way [53] would be to read those into the record.

The Court: Whatever you desire.

Mr. Arndt: Unless to save time I can point out each one except the particular ones I want to call you Honor’s attention to for some particular purpose and have them written into the record afterwards.

The Court: Counsel, I think the question and answers that you want to introduce into the record should be read into the record in order that I may follow your theory of the case.

Mr. Arndt: Very well.

The Court: And more intelligently understand it as we proceed.

Mr. Arndt: Very well, your Honor.

Interrogatory No. 1:

Set forth the names and places of residence of each officer of Crystal from January 1, 1937, to the date upon which these interrogatories are answered, and state the office or offices held by each during said period.

(Answer) :

Title and Name	From	To
Chairman of the Board		
C. K. Boettcher.....	Jan. 1, 1937	Dec. 20, 1948
Vice-Chairman of the Board		
W. N. Wilds.....	Jan. 1, 1937	Dec. 20, 1948
President		
W. N. Wilds.....	Jan. 1, 1937	Dec. 20, 1948
Vice-Presidents		
H. E. Zitkowski.....	Jan. 1, 1937	Dec. 20, 1948
J. B. Grant.....	Jan. 1, 1937	May 20, 1947
J. B. Hayden.....	July 26, 1946	Dec. 20, 1948
Secretary		
W. E. Kraybill.....	Jan. 1, 1937	Dec. 20, 1948
Assistant Secretaries		
J. B. Hayden	Jan. 1, 1937	Dec. 20, 1948
J. A. Summerton.....	Jan. 1, 1937	Dec. 20, 1948
C. L. Allen.....	Jan. 1, 1937	Mar. 10, 1944
H. von Bergen.....	Aug. 6, 1948	Dec. 20, 1948
Treasurer		
W. E. Kraybill.....	Jan. 1, 1937	Dec. 20, 1948
Assistant Treasurers		
J. B. Hayden.....	Jan. 1, 1937	Dec. 20, 1948
J. A. Summerton.....	Jan. 1, 1937	Dec. 20, 1948
C. L. Allen.....	Jan. 1, 1937	Mar. 10, 1944
H. von Berger.....	Aug. 6, 1948	Dec. 20, 1948
General Counsel		
J. B. Grant.....	Jan. 1, 1937	May 20, 1947
M. A. Lewis.....	Aug. 4, 1947	Dec. 20, 1948
Comptroller		
J. A. Summertone.....	Aug. 4, 1947	Dec. 20, 1948
Auditors		
R. H. Graham.....	Jan. 1, 1937	Nov. 30, 1947
E. E. Merrill.....	Dec. 1, 1947	Dec. 20, 1948

The place of residence of the above named individuals during the periods shown was Denver, Colorado.

The Court: Let me ask, you are reading from what?

Mr. Arndt: The answers to interrogatories.

The Court: And those answers are on file?

Mr. Arndt: Yes, Your Honor.

The Court: May I ask is there any objection to the introduction of all the answers?

Mr. Arndt: Yes.

The Court: There is objection?

Mr. Arndt: Yes, as far as I am concerned. I am not offering all of them.

The Court: The only thing is I am listening now to the names of officers of the company. What does that mean to me in trying to pass upon the issues in this case?

Mr. Arndt: Because, Your Honor, subsequently I take the deposition of certain of these officers and I endeavor to find out who talked with the other two companies and who made the arrangement and I get certain responses from these various persons whose depositions I have taken. And those responses will be subsequently offered by me in evidence.

The Court: All right, proceed.

Mr. Works: May I clarify our position on that, Your Honor? [56]

Your Honor may or may not want to hear that testimony but we have already stated our view that, Your Honor, has the right to infer an agreement to this joint net arrangement. Now, who was present

or who wasn't, it seems to me, is rather immaterial in view of that concession but I say if Your Honor desires to hear it it is all right with us.

Mr. Arndt: Our position went far beyond that. It is our position that certain inferences can be drawn far beyond that inference and I think if they do not produce people here who made the agreement or who testified as to what was said then we are going to argue that certain additional inferences can be drawn therefrom.

The Court: Well, as I say, I am going to permit you to introduce your theory of the case but I have also in mind Mr. Whyte's statement that I can infer that there has been an unlawful agreement between the parties.

Now, to what extent that affected you and to what extent it has damaged you is something else.

Mr. Works: May I say this, Your Honor, our concession went no further as I have stated.

I stated the court could infer there was an agreement or understanding between the three companies to use this joint or multiple net basis of settlement with the beet growers. Now, whether it is unlawful or not is Your Honor's province but we make no such concession. [57]

The Court: I take it, in combination with the Supreme Court decision, and I may be one track minded, counsel, but I am still going back to the question that has bothered me throughout this whole proceeding and that is whether or not they can establish damages by reason of that. In other words, they first started out with this sugar allotment and

they abandoned that because you were not under that arrangement at that time.

Mr. Arndt: Your Honor, I wouldn't say we abandoned that. We have used this as our present theory. If the court throws this theory out we can pick a half dozen other theories. We haven't abandoned anything as far as that is concerned, because we intend to show they were under the act as part of our evidence here.

The Court: I thought you struck that from your complaint.

Mr. Arndt: No, all we struck from the complaint was the allegation that those were the reasonable prices. That is all we struck.

The Court: But didn't that have that effect?

Mr. Works: I had always assumed so.

Mr. Arndt: I don't think so.

The Court: I am not trying to make it hard for you, Mr. Arndt, but I am trying to get you down to earth a little bit so I can follow your theory. I think in a sense I can [58] understand your theory.

Mr. Arndt: But, Your Honor, when Your Honor throws words at me such as "abandon" that is a harsh word and I must disavow it.

The Court: All right, you disavow it and let the record so show.

I am not trying to commit you to anything, but I was wondering this. You have read the names of the directors and the other officers of the company. Counsel says they entered into this agreement and what inference is to be drawn from it is a matter for the court. Now, why can't we, as long as I am going to

have to study these different theories, why can't the questions and answers to the interrogatories, certain ones, be admitted in evidence and those that you wish to emphasize you may read. But reading an interrogatory and an answer like that doesn't mean anything to me.

Mr. Arndt: A lot of these interrogatories are preliminary. Many of them can be done that way. If I may refer to certain interrogatories and have them considered as being read into evidence and then when I come to one that I think is of prime importance to Your Honor I will call that particular one to Your Honor's attention.

The Court: Why don't you do this, Mr. Arndt? With reference to those you call preliminary questions indicate them by number and the answers and have them deemed read and [59] they will be copied into the record.

Mr. Arndt: All right.

The Court: For a quick reference and then those that you wish to emphasize you actually read and if there are any of the interrogatories you feel you want to emphasize that he hasn't you have that same privilege.

Mr. Works: Thank you.

The Court: In other words, we will do like we do in a jury trial. There will be a lot of documentary evidence and it is admitted in evidence and each counsel has a right to read that portion to the jury which he feels is material and important.

Mr. Works: That is quite all right.

Mr. Arndt: But I am not conceding they have the right to offer any particular interrogatory.

The Court: Did they submit any to you?

Mr. Arndt: No. I told them if they wanted any to submit them to me but I never received any. Is it necessary that they be written into the record of the reporter when the answers are a part of the record anyway? Why can't we just incorporate them by reference in the reporter's transcript.

The Court: But look at the size of this file and the work required to correlate it.

Mr. Arndt: These are interrogatories and answers. [60]

The Court: But you try to correlate the record so that they can intelligently be understood either by myself or a reviewing court. The reviewing court will not go through that record unless you have it printed.

Mr. Arndt: Our next is No. 3 which can be handled in the manner the court specified.

The Court: These interrogatories were filed on what date?

The Clerk: The interrogatories of the plaintiff were filed November 22nd, 1948, and the answers to certain of the interrogatories were filed on January 11, 1949.

Mr. Arndt: Then there were some additional interrogatories.

The Clerk: Yes, there are some more down through there.

Mr. Arndt: And certain additional answers. I think there were three sets of interrogatories.

The Court: Very well, the reporter will copy interrogatory No. 3 and the answer thereto into the record.

(Interrogatory No. 3:

Paragraph 5 of the 1939, 1940 and 1941 contracts between Crystal and growers of sugar beets in California north of the 36th parallel refers to "the average net returns . . . received for sugar manufactured at beet sugar factories located in California north of the 36th parallel." State the location of each such factory and the name of the company operating it during each of said cropping years.

(Answer to Interrogatory No. 3): [61]

Clarksburg, California: Operated by American Crystal Sugar Company.

Alvarado, California; Tracy, California; Hamilton City, California: Operated by Holly Sugar Corporation.

Spreckels, California; Manteca, California; Woodland, California: Operated by Spreckels Sugar Company. [62]

Mr. Arndt: I might save time merely reading the interrogatories and then have the answers.

The Court: May I ask you this? Is there anything in those interrogatories and answers that you feel would hurt your case, if answered? In other words, I would suggest that you take the questions and answers and introduce them in evidence.

Mr. Arndt: I don't want to introduce certain of them.

The Court: That is the reason I ask you that question. Is there any answer in there that hurts you?

Mr. Arndt: I can't answer that question, Your Honor. There are too many of them.

The Court: You can proceed your own way. I was trying to be helpful.

Mr. Arndt: Interrogatory No. 3 and the answer thereto.

Interrogatory No. 4 and the answer thereto.

Interrogatory No. 5 A, b, c, d, and the answers thereto. Those were not included on the list I gave you, but were subsequently added.

Mr. Works: Mr. Arndt, pardon me, but there must be a lack of correlation there. Our answer starts 5 C a. Apparently something happened to A and B.

Mr. Arndt: That should read 5 B.

Mr. Works: There is no answer to it.

Mr. Arndt: There is. That answer was filed in your [63] answers that were subsequently filed after the court order, and you will find it on page 5 of the answers. Pardon me. It is on page 2 of the additional answers.

Mr. Works: 5 B?

The Court: May I suggest to both of you that in introducing the various matters by reference, if upon a check either party finds they have got an error and you can't settle it by conference, that the matter be submitted to the court, because it is very easy for either one of you to make an error.

Mr. Whyte: The answer to 5 B and 5 D were

filed February 21, 1949. That is 5 B only. That was filed February 21, 1949.

Mr. Arndt: Then the next is the interrogatory 5 C and the answer thereto.

The Court: Are these preliminary interrogatories, Mr. Arndt?

Mr. Arndt: Well, probably I'd better just read the interrogatories and not read the answers in.

The Court: The only thing is, the court finds it very difficult in examining the record where in one document you have the question and in some other document you have the answer to that question. Some place along the line, in order that these can be intelligently followed, there is going to have to be a document prepared that gives the question and [64] the answer together.

Mr. Arndt: Then I think I had better read it in.

The Court: Why don't you read it in by reference and the reporter will write it up and you will have it in your record and I will read the record.

Mr. Arndt: That I will do, then.

The Court: I am going to have to read this record.

Mr. Arndt: I will return to interrogatory No. 3, which is found on page 2 of the interrogatories, and commences, "Paragraph 5 of the 1939, 1940 and 1941 contracts between Crystal and Growers of Sugar Beets in California north of the 36th parallel," and the answer thereto is at page 9 and starts with the words, "Clarksburg, California."

Interrogatory 4, which is on page 2 of the interrogatories, starts with the words, "Were there any other beet sugar factories located in California," and

the answer, which is found on page 9 of the answers, starts with the words, "There were no beet sugar factories located in California."

5 B, which is on page 2 of the interrogatories, gives the information requested in item 5 A as to subparagraphs b, c, and d, which are dates, "August 1, 1939, August 1, 1940, August 1, 1941," and the answers which appear on page 2 of the additional interrogatories, answers which Mr. Whyte just identified.

The Clerk: Filed February 21, 1949. [65]

Mr. Arndt: 5 C, which interrogatory is on the bottom of page 2 and the top of page 3 of the interrogatories, and the answer is on page 9 of the answers.

Then 6 B, which is on page 3 of the interrogatories, and the answer is on page 15 of the answers.

7 B of the interrogatories, which appears on page 4 of the interrogatories, and the answer on page 16 of the answers.

8 B of the interrogatories, which appears on page 4, and the answer, which appears on page 17 of the answers.

8 D, which interrogatory appears on page 5, and the answer appears on page 3 of the February 21—

Mr. Whyte: I beg your pardon, Mr. Arndt. That is page 2, is it not?

Mr. Arndt: Is it page 2? I have it down here as page 3. It starts with the words, "The requests made——"

Mr. Whyte: Are you speaking of 8 D?

Mr. Arndt: 8 D.

Mr. Whyte: 8 D begins and ends on page 2 of the answers filed February 21.

Mr. Arndt: That was amended on page 3 of the defendants' amended answers to certain interrogatories submitted by plaintiff, and I am referring to page 3 of the defendants' amended answers to certain interrogatories.

Mr. Whyte: When were those filed, Mr. Arndt?

The Court: Gentlemen, you are getting into an [66] impossible situation, as far as your record is concerned. I would like to make still another suggestion and see if I can finally hit upon a happy one. For instance, tomorrow is a holiday. That will give you some time to work. Why don't you go through those interrogatories and say, "Here are certain ones we don't want to introduce in evidence," and then introduce the balance in evidence, with the exception of certain ones, and then have the reporter take this record and write them up?

The reason I mention it is because we had one of these movie interrogatories in here, and I don't know whether you asked more questions than they did or not, but, anyhow, you were close competitors, and it was hard for the court to determine the questions and answers and correlate them. The reporter took the time to write out the question and then the answer underneath, and when we got through, we had a transcript and we had all the questions and answers that were introduced in evidence, that were admitted, right in the transcript.

Either the reporter should do that or counsel ought to do it. You go through the record and determine

the ones you want to introduce, and then either have your own stenographic force write up those questions and answers and introduce them in evidence, or have them deemed read, and the reporter will write them up, so that when you pick up the record [67] here is a question and here is an answer, and you don't have to finger through a lot of pages.

Mr. Works: Either way is all right with us. Mr. Arndt will be introducing the interrogatories, we won't, and whatever way is satisfactory to the court will be satisfactory to us.

The Court: The only thing is by the time we figure out what the evidence is, we will have had a lot of difficulty.

Mr. Arndt: I don't think it can be done tomorrow, but I will be very glad to have each of the interrogatories written out and the answer attached thereto, and I will submit them before the case is closed. I will be very happy to do it, if I have time to do it.

The Court: Time is not a very important element in this case.

Mr. Arndt: I can do that, Your Honor, and I will have it done with sufficient copies so that counsel will have them and everybody will have them. That I can do.

The Court: You can do it any way you want, counsel, but I am just sitting here listening to a lot of figures that don't mean anything to me. I am just wasting my time listening, and you are wasting your time, and everybody else's time, except for the purpose of perfecting your record.

Mr. Arndt: Anyway the court desires, I will do.

The Court: I am going to let you make your own choice. [68] I am just making various suggestions. I can sit here and listen until we get through and if I haven't a record I can understand, that is going to be your fault.

Mr. Arndt: I will have them prepared in typewritten form, each of the interrogatories followed by each of the answers that I desire to use. I am calling Your Honor's attention at this time only to a few of them. I assume that is satisfactory with counsel?

Mr. Works: Oh, yes.

Mr. Arndt: May I then read merely the numbers of those that I will handle in that matter?

The Court: Yes.

Mr. Works: Why read them, Mr. Arndt, if you are going to have them typed up anyway?

The Court: You want to have them in the record to show the numbers?

Mr. Arndt: To show what I am going to supply. There ought to be something here to tie into it, that is all.

Mr. Works: All right.

Mr. Arndt: No. 1, No. 3, No. 4, 5 B, b, c, d, 5 C, 6 B, 7 B, 8 B, 8 D, 9 B, 9 C, 9 D.

Certain letters set forth in the answer to interrogatory No. 11, as follows:

Letter of September 12, 1938, from Lester J. Holmes to Denver office. [69]

Letter of September 19, 1938, from H. E. Zitkowski to L. J. Holmes.

Letter from Lester J. Holmes to Denver office, dated September 28, 1938.

Letter from Lester J. Holmes to Denver office, dated October 12, 1939.

Letter of October 31, 1939, from L. J. Holmes to Denver office.

Letter of November 6, 1939, from Zitkowski to Holmes.

Letter of September 27, 1940, from Holmes to Denver office.

Interrogatory 26, the Haskins and Sells statement on page 29 and the answer thereto.

Interrogatory 32, 33, 38.

That part of the answer to 40 that appears on pages 164, 165, 167, 168, 169 and 170 of the answers to the interrogatories.

No. 50, 51, 52 A, B, C, D and E, 54, 55, 58, 61, 62, 86, 87, 90, 91, 96.

No. 107, 110, 113, 121, 122, 123, 132, 137, 138, 139, 140, 145 C, 145 D, 145 E, 146 A and B, 147, 148, 150 A, B, C, D and E, 151 A, 153, 154, 156, 158 B, 160, 163, and 166.

Evans interrogatory No. 8, 9, and 10.

Those are the ones that I will supply to the record in the manner I have set forth. [70]

I want to call Your Honor's attention to certain of these letters in response to interrogatory No. 11, particularly the letter found at page 52 of the interrogatories, a letter of November 6, 1939, from H. E. Zitkowski to Lester J. Holmes in reply to a letter of October 31, 1939. The first two paragraphs are of particular interest in the letter of November 6th,

which I will read and call Your Honor's attention to.

"On returning to Denver, I find your letter of October 31st with reference to your meeting with the local growers committee on the subject of the 1940 beet purchase contract. I shall in all probability be with you in the near future, and it may be well to permit the matter to rest until that time and then, if it is considered advisable, to discuss the subject further with the growers' representatives. It is difficult to cover such a discussion in a letter without going into it very extensively. Referring briefly, however, to the three points raised, let me give you the following comments.

"Concerning the first objection, which refers to an average net selling price for the sugar produced in Northern California, I think you yourself understand the principles behind this very thoroughly. The principal objective therein is to obtain, as far as this is possible, a higher average net receipt for sugar by avoiding, as much as possible, cut-throat competition, crosshaul of sugar, and other similar practices, [71] all of which tend to depress the receipts for sugar and benefits principally the transportation companies and some of the dealers in sugar to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets."

Then 87 is the interrogatory which reads:

"The answer of Crystal admits the authenticity of the form and contents of those certain contracts, copies of which are annexed to the amended complaint as Exhibits A, B, C, D and E. Exhibit B is

the 1939 growers contract and provides in paragraph 5''——

The Court: I have read those contracts, counsel.

Mr. Arndt: Then it goes on and states:

“Was this change in the method of payment from the 1938 method of using average net return for sugar manufactured at Crystal’s Clarksburg factory to 1939 method of using the average net return of all beet sugar factories in California north of the 36th parallel, made with or without consultation, discussion or conference by Crystal with any of the other manufacturers of sugar in California north of the 36th parallel?”

“Answer: Change referred to in this interrogatory was made with consultation, discussion or conference by Crystal with the other manufacturers of sugar in California north of the 36th parallel.” [72]

The Court: Mr. Works made that same statement this morning.

Mr. Arndt: That will tie in.

The Court: It is one minute of 12:00, counsel.

Mr. Arndt: Pardon me?

The Court: Do you think we will save anything by starting in on something else now?

Mr. Arndt: I was going into an entirely different field, so it would be a good time to adjourn.

The Court: We will take a recess until 2:00 o’clock.

(Thereupon, at 12:00 o’clock noon, a recess was taken until 2:00 o’clock p.m.) [73]

Los Angeles, California,
Tuesday, February 21, 1950, 2:00 p.m.

The Court: You may proceed, gentlemen.

Mr. Arndt: If the court please, I next desire to offer into evidence certain portions of the depositions.

The Court: How can you introduce a portion of a deposition?

Mr. Arndt: If it is an officer of the opposing company it is admissions against interest.

The Court: I am talking about the deposition. How can you pick out a portion of a deposition and say "I am going to introduce this question and this answer but not introduce the rest of it"?

Mr. Arndt: I can do it if for no other reason than it is an admission against interest.

The Court: I haven't any objection but it is something new to me.

Mr. Works: We reserve the right to offer any other portions, Your Honor.

The Court: Yes. I am still up in the air. I want to know how you can take a deposition and then come into court and say: "I am only going to use part of it."

Mr. Arndt: If it is the deposition of an officer of the opposing side then it becomes an admission against interest, if the court please. [74]

The Court: I haven't any objection to it but it is the first time I ever had anybody come into court after taking a deposition and say they only wanted to introduce part of it. Go ahead. It is all right with me.

Mr. Works: Which one is it, please?

The deposition of Mr. Zitkowski. I will follow it exactly until I come to Mr. Wilds. I will follow exactly the portions set forth in the document heretofore served upon you and filed in court and entitled "Portions of the depositions to be used by plaintiffs." I will give the reporter a copy of it.

The Court: If there are any questions or answers read them into the record.

Mr. Arndt: This is merely an identification. There are no questions on this piece of paper.

The Court: But the parts you are going to introduce you will read into the record.

Mr. Arndt: That is right. I am merely giving this to the reporter in case he wants to compare it with the original against some names. This identifies it. This document is on file here and contains nothing of the deposition itself.

The Court: Go ahead.

Mr. Arndt: Taking the first item:

"Q. What is your name—" strike that.

This witness is Mr. H. E. Zitkowski. The [75] first question is:

"Q. What is your name and your connection with the American Crystal Sugar Company?

"A. My name is H. E. Zitkowski. I am general consultant for the American Crystal Sugar Company.

"Q. What positions have you formerly held with the American Crystal Sugar Company and when?

"A. Many and various, ranging from laboratory

(Deposition of H. E. Zitkowski.)

boy more than 50 years ago to assistant chemist, chief chemist, general chemist of all the company's operations; then superintendent and general superintendent and eventually vice president and general manager of production.

"Q. When did you become vice president and general manager? How long did you continue in that position?

"A. I can't tell you just when I became general manager but it was probably about 15 years ago, until March 1st of this year when I relieved myself of the duties and responsibilities of vice president and general manager of production.

"Q. You are the H. E. Zitkowski who signed the first set of answers to the first set of interrogatories in this case? "A. I am." [76]

Mr. Arndt: The second item starts at page 6.

"Q. Did American Crystal Sugar Company sell any molasses, pulp, or other by-products from either Clarksburg or Oxnard in the cropping years 1939, 1940 and 1941? "A. They did.

"Q. Which one of those was sold?

"A. Pulp and molasses; in the case of Clarksburg, pressed pulp; in the case of Oxnard, dried pulp.

"Q. Was a different method of extraction or manufacture of sugar used at Oxnard than was used at Clarksburg during these cropping years?

"A. The method of extracting the sugar and refining it to sugar from sugar beets was identical in

(Deposition of H. E. Zitkowski.)

both plants. In the case of Oxnard, we have an additional process which extracts sugar from molasses, which is not the case at Clarksburg.

“Q. And what is that process called?

“A. The Steffens process.”

The Court: Gentlemen, off the record.

(A discussion was had off the record.)

Mr. Arndt: The third item commences on page 7.

“Q. I will reframe it. During the years 1939, 1940 and 1941, were the growers in Southern California who dealt with Crystal paid for their beets upon a formula in which one of the variables was the average net return secured by the [77] sugar factories in Southern California for the sale of sugar during those particular years?”

Mr. Works: If the court please, that will be objected to as incompetent, irrelevant and immaterial, and not going to prove or disprove any issue in this case as regards the Oxnard operation.

The Court: I am going to reserve my ruling. I want to enable you to protect your record. It may be necessary, to properly protect your record, to make a motion to strike, when this evidence is in, because of immateriality. I am permitting this to go in on the materiality. That is the only objection, isn't it, that you are reserving?

Mr. Works: Yes, that is correct.

The Court: The materiality?

Mr. Works: Yes, Your Honor.

(Deposition of H. E. Zitkowski.)

The Court: As I stated before, I don't know what theory we are finally going to settle on in this case, and so I will have to take all the evidence, receive it, and then try to sift out some method of getting at the truth and the facts. About the only thing I can do now is to receive it.

Mr. Works: The only thing I had in mind——

The Court: Is to protect your record?

Mr. Works: That is correct, Your Honor.

The Court: I don't know whether that will completely protect your record, to have a running objection. I was thinking [78] about that this morning.

Mr. Arndt: I will stipulate.

The Court: I understand your stipulation, but if there is anything substantial, I would like to recommend to both counsel that the way to protect your record is to make a motion to strike, and then my ruling on that will protect you.

Mr. Works: That is fine.

The Court: And in making the motion, refer to the book and page of the transcript.

Mr. Works: And may we have a standing objection to this ?

The Court: As to the Oxnard plant?

Mr. Works: Yes, that is correct, Your Honor. Thank you very much.

Mr. Arndt (Continuing reading):

“A. Yes.

“Q. Now, in determining the net return of Crystal that was used as a part of the average net return,

(Deposition of H. E. Zitkowski.)

was all of the sale of sugar included, or was there an exclusion of this sugar that was refined from this process to which you have referred?

“A. All of the sugar produced at Oxnard entered into the average net return received for sugar which was used as a settlement basis as one of the factors.

“Q. And was that regardless of which process the sugar [79] was extracted by?”

The Court: I thought they said they were both the same process.

Mr. Arndt: Yes. First, they extract sugar by the ordinary process. That produces sugar and molasses.

The Court: I mean in the answer there. I thought his answer was they both used the same process.

Mr. Arndt: No, Your Honor. I will go back.

“Q. Now, in determining the net return of Crystal that was used as a part of the average net return”——

The Court: No, the question before. You asked him about the process at the two plants, the two refineries.

Mr. Arndt:

“A. The method of extracting the sugar and refining it to sugar from sugar beets was identical in both plants. In the case of Oxnard, we have an additional process which extracts sugar from molasses, which is not the case at Clarksburg.”

(Deposition of H. E. Zitkowski.)

I can explain that, Your Honor.

The Court: I understand it. I misunderstood the question. You may proceed.

Mr. Arndt: "A. Correct."

The next is item 4, which starts on page 11.

"Q. Again, that is not what I am asking for. I apparently have not made myself clear. I am not now asking as [80] to the method of determining the formula in the first place. I am referring to the formula as it appeared in the contract. The formula as it appeared in the contract provided for a payment to the grower of certain sums per ton of sugar beets, depending upon the sugar content of his beets and upon the average net return received by Crystal from the sale of the sugar. The question I am asking is whether, in paying the grower, the average net return to the grower included the sale of sugar, or included the sale of sugar and the sale of molasses, pulp, and other by-products.

"A. Included the sale of sugar as far as the buildup of the scale is concerned.

"Q. Then, when the grower was paid, the payment to the grower was determined by the net return of Crystal from the sale of sugar and not from the sale of sugar plus the sale of molasses, pulp and other by-products?

"A. That is correct, as far as the scale is concerned.

"Q. Did the same thing occur in 1939, 1940 and 1941?

"A. Correct."

(Deposition of H. E. Zitkowski.)

The next is item 5, which is on page 14.

“Q. I call your attention to certain inter-company correspondence dated September 12, 1938, which is found at page 24 of the answer to the interrogatories——

“The Witness: Would that be in here?” [81]

“Mr. Graham: I think that is in the original set of answers.

“Mr. Arndt: That is right.

“Q. ——which is a letter from Lester J. Holmes to the Denver office, Attention of H. E. Zitkowski. I call your attention to the first paragraph which refers to someone named George. Who was George?

“A. I think it was George Wilson, a beet grower in the area. I believe that was what was stated in answer to a similar question in one of the interrogatories. It is a possibility it might have been George Holmes, who also was a beet grower in the area, but my thinking is that it was George Wilson. [82]

“Q. Now, I call your attention to the first sentence of the second paragraph of that letter, which reads: ‘In regard to the joint net return, while he hesitated to be critical of it, he was afraid that, due to the larger volume of net sugar that the Spreckels Sugar Company sold, they would attempt to push their cane sales, in which they alone were interested, and ship beet sugar where there was a freight absorption as the growers stood 50 per cent of this freight absorption.’ What is referred to by the expression ‘freight absorption’ ”?

“A. What Mr. Holmes undoubtedly had in mind

(Deposition of H. E. Zitkowski.)

was that the cost of transportation to market would be more than the pickup of freight from some refinery point to this delivery point.

“Q. What delivery point?

“A. Well, wherever Clarksburg sugar might have been delivered to.

“Q. If Clarksburg sugar was shipped to Nevada, was it not sold at a price which would include freight from San Francisco to Nevada?

“A. Let me answer that question this way: I want to make an explanation here that, while I am in general familiar with the methods in which sugar is sold, I have never had charge of the sales policies [83] or the sale of sugar, and I am not competent to answer specifically whether Clarksburg sugar shipped to Nevada would realize the San Francisco price plus the freight from San Francisco to Nevada. There are too many other factors that enter into the delivered price of sugar or the returns that we received from Clarksburg sugar delivered in Nevada.

“In the first place, beet sugar is generally sold at a lesser price than is cane sugar in any given area. There may be some exceptions to that now and then, but there is what the trade calls a differential between the price of beet sugar and cane sugar and, then, there are many other factors that enter into the delivered price of sugar, and someone having had sales experience is better qualified to point out all those variables than I am able.

“Q. Then, when you received this letter from Mr. Holmes which referred to freight absorption,

(Deposition of H. E. Zitkowski.)

did you or did you not know what was meant in the sugar trade by the expression 'freight absorption' at the time you received the letter?

"A. I have a general idea of what it meant, yes.

"Q. Isn't it true that the expression 'freight absorption' has no reference whatsoever to the [84] differential between the price of cane and beet sugar.

"A. Your question was, isn't it true that freight on the San Francisco base price was added and that that established the delivered price of Clarksburg sugar?

"Q. Let us return to the expression 'freight absorption.' Is it not a fact that in September, 1938, at the time this letter was written, at the time you received this letter, when sugar was sold, three possible situations as to freight arose? Either there was a freight absorption, or there was what is commonly called phantom freight, or the amount of freight was paid by the company and was equal to the amount of freight charged the purchaser, isn't that true?

"A. That is probably true, although you should get a sales expert to definitely establish that point.

"Q. In any event, when you received this letter from Mr. Holmes, you did not ask him in any way what he meant by freight absorption?

"A. I don't know that I did, no.

"Q. What is your best recollection?

"A. I don't know that I did.

"Q. Do you mean by that, you don't remember, or you mean as far as you remember you didn't ask him?

(Deposition of H. E. Zitkowski.)

"A. As far as I remember, I didn't ask him.

"Q. Now, then, let us continue in the same sentence [85] where it says, 'as the growers stood 50 per cent of this.' Now, that referred to the freight absorption, didn't it?

"A. It undoubtedly did, yes.

"Q. Would you explain to me how the growers stood 50 per cent of the freight absorption?

"A. Well, the grower is settled for on the basis of the net receipts for sugar by the company, and from the gross receipts are deducted a number of items, including freight paid on sugar. In other words, we sell sugar on a delivered basis and pay the freight to destination. Now, the grower is settled for on the net receipts. Mr. Holmes makes an assumption there that is not quite correct, when he says the grower stood 50 per cent of this. That figure is not necessarily 50 per cent but various sums.

"Q. Would it be a correct statement to say that it is on the average 50 per cent, with certain situations being slightly more than 50 per cent and certain slightly less than 50 per cent?

"A. Generally speaking that is true.

"Q. So that the formulas were so worked out that on the average the growers received 50 per cent of the net return of sugar, and the manufacturer [86] received 50 per cent of the net return of sugar, approximately?

"A. Well, I would want a definition of the word 'approximately.' Some of the returns per ton of

(Deposition of H. E. Zitkowski.)

beets to growers are substantially more than 50 per cent of the receipts for sugar.

“Q. And some were less than 50 per cent?

“A. It is possible.

“Q. Would it be a fair statement to state that the growers received on the average 50 per cent or more of the net return from the sale of sugar?

“A. That is correct.

“Q. And these formulas that were worked out in the contracts were worked out on that basis, is that correct?

“A. On what basis?

“Q. The basis of the grower receiving on the average, approximately 50 per cent or more of the net return.

“A. Or more, yes.

“Q. So, then, returning to this reference to freight absorption, what Mr. Holmes has, in effect stated, was that since the grower received approximately 50 per cent or more of the net return of sugar and since all freight absorption was deducted from the gross [87] return in determining the net return, therefore the grower, in effect, was paying approximately 50 per cent of the freight absorption.

“A. That is his assumption, undoubtedly.

“Q. Now, was that a correct assumption?

“A. If there was a freight absorption, yes.”

Now, No. 6 starts on page 28:

“Q. Now, in Montana and Colorado in 1939, 1940 and 1941 were any of your purchase contracts with growers based upon the average net return of more than one factory?”

(Deposition of H. E. Zitkowski.)

Mr. Works: That is objected to, Your Honor, as irrelevant and immaterial and not going to prove or disprove any issue in the case. And may we have an extending objection to this line of testimony also?

The Court: Yes. I remember when that question came up in the requests for interrogatories.

I permitted counsel to go into that on the assumption that Mr. Arndt was trying to tie in interstate commerce a little more closely. I don't know what materiality it has. I don't know how it is material, what they did in Montana and Colorado, unless it has something to do with the interstate commerce feature. After all we have growers here in California and as has rather diplomatically been stated this morning, there is certainly an inference of an illegal [88] transaction or a transaction that smirks of illegality and the questions that we are concerned with primarily are whether interstate commerce is involved and the amount of damages if any.

Mr. Works: Here, as I understand it, counsel is merely trying to establish the basis of payment to growers in these other states and it doesn't seem to me that that has anything to do with our problem. That is the basis of my objection.

The Court: I am inclined to agree with you, counsel.

Mr. Arndt: The evidence will show, if the court please, that with the exception of Colorado, no place that Crystal operated did Crystal have a joint return with any other company but that in the one state

(Deposition of H. E. Zitkowski.)

where Holly was present. They had a joint return with Holly Sugar Company in Colorado.

The Court: What will that establish?

Mr. Arndt: Which is the same Holly that was the sugar company involved in northern California and the same Holly Sugar Company that is involved in southern California, so that insofar as Holly is concerned here we have agreements with Holly in Colorado as well as in California.

The Court: What does that prove?

Mr. Arndt: I think inasmuch as Mr. Works still insists that interstate commerce is not involved and that the court has not decided the question, that this is important on that issue. [89]

The Court: How does that tend to prove anything, because they had an agreement with them? Assume it is true that in Colorado they had a similar set of agreements that they had in California and with the same people, what will that prove so far as we are concerned here? In other words, it is the control of the price of sugar or the price that the grower is to receive that we are interested in and the price the grower received in Colorado doesn't tend to prove that the price here was fair or unfair.

Mr. Arndt: Mr. Works has taken the position that it only affected California and therefore interstate commerce is involved. That is his consistent position and he insists the Supreme Court decision means one thing and I insist it means something else.

The Court: I think Mr. Works' position is whether or not we are talking about sugar or about beets. I don't think you contend for a moment that

(Deposition of H. E. Zitkowski.)

your company dealing in sugar is not engaged in interstate commerce?

Mr. Works: Not at all. We sell sugar all over the United States.

The Court: So that sugar from your plants in California may end up in New York or any other place?

Mr. Works: Undoubtedly does.

The Court: But your question on interstate commerce is still back to the narrow question upon which I made my [90] original ruling and which Justice Rutledge felt that I hadn't narrowed it sufficiently.

Mr. Works: Yes.

The Court: In other words, going back now to Mr. Works' position, he still reserves the position that when you are dealing in beets you are not dealing in interstate commerce unless those beets leave the confines of the State of California.

Mr. Works: I would state——

The Court: Isn't that your position?

Mr. Works: I would state it somewhat differently, Your Honor.

The burden is upon the plaintiff of showing what we did in California with reference to the beets; whether a substantial economic effect upon interstate commerce was had.

Now, Mr. Justice Rutledge's opinion as I see it, is simply to this effect, that this agreement—I mean this understanding or whatever it was, is not insulated from the operation of the Sherman Act even though it did involve a farm product if it be shown

(Deposition of H. E. Zitkowski.)

that what was done in Northern California had a substantial economic effect on interstate commerce.

I think that is the whole thing in a nut shell. This case has now become the converse of the Frankfurt Distillery case where you remember the interstate product came into [91] the state and then there were restraints in intrastate distribution. This is the same situation in an opposite way.

Here you have farm products which are processed and the processed product undoubtedly goes into interstate commerce. But it seems to me, Your Honor, that we are here talking about prices paid to growers in Montana and Colorado which has nothing to do with solving the question as to whether this situation in California had a substantial economic effect on interstate commerce. And certainly it has nothing to do with any question of whether these plaintiffs, growers, suffered any damage from what was done in California.

The Court: I think under that theory it is admissible because if it is shown your company was doing the same thing in other areas it would show it to be a widespread practice.

Mr. Works: If Your Honor please, and if I may say so, it is sort of a boot strap situation because the same question would arise if a law suit were filed by a Montana or Colorado grower upon the same theory upon which these law suits are filed. He would have to show that the arrangement in his state had a substantial economic effect upon interstate commerce.

The Court: Well, I will be frank with you gen-

(Deposition of H. E. Zitkowski.)

lemen, if you have to rely upon that to save your hide you are going to lose your hide.

Mr. Works: Well, that may be, Your Honor, but I still [92] submit this line of testimony is immaterial even to what Your Honor has in mind.

The question is whether what we did had that effect and not whether what was done in Colorado and Montana had that effect. That is another law suit or a potential law suit.

The Court: Well, the statute has run against everybody now under these contracts.

Mr. Works: That is why I said "potential." Perhaps it isn't even potential. Let us say it is a similar factual situation and I don't see how it helps Mr. Arndt at all.

The Court: I don't see how it helps him. How much of that is there?

Mr. Arndt: Of this particular thing?

The Court: Yes.

Mr. Arndt: Two and a half pages.

The Court: He can read it more quickly than we can argue it.

Mr. Works: May the objection be reserved, Your Honor?

The Court: Yes.

Mr. Arndt: I think I read the question. The answer is:

"A. Yes.

"Q. Where did that occur?

"A. It occurred in Colorado; it occurred in Colorado, and it occurred in Iowa and Minnesota.

(Deposition of H. E. Zitkowski.)

“Q. Now, in those states—— [93]

“Mr. Graham: Excuse me just a minute. May I have that question read back?”

And the question was read.

“Q. Now, in these instances that you have mentioned where there was an average net return of more than one factory, were those factories owned by more than one company? “A. Yes.

“Q. Where did that occur?

“A. In Colorado.

“Q. Now, what companies were involved in the Colorado contract?

“A. The Holly Sugar Corporation.

“Q. By that do you mean that Holly and Crystal each paid their growers upon the average net return of their factories in Colorado?

“A. That is correct. I beg your pardon. I will have to qualify that some.

“Q. Yes.

“A. The Holly Sugar Corporation had a factory in a different section of the State of Colorado, which wasn't included in this joint net settlement basis with the American Crystal.

“Q. What particular section of Colorado was included? [94]

“A. The northeastern Arkansas Valley. In other words, our Rocky Ford plant was included with the Holly Sugar Corporation's plant in that same valley.

“Q. For what years was that true?

“A. That was true for all years since 1921, although there were some government measures set

(Deposition of H. E. Zitkowski.)

up during the war years, when the sugar nets didn't enter into the settlement for beets, but we started the joint net settlement basis in Colorado in 1921.

"Q. And that continued at least through 1941, is that correct? "A. Yes.

"Q. Now, referring to the balance of Colorado, were the growers paid there upon a joint or single net return, insofar as Crystal was concerned?

"A. Insofar as Crystal was concerned?

"Q. Yes.

"A. We only have this one plant.

"Q. Insofar as Montana, how was it handled?

"A. We only have one plant there.

"Q. Did you pay there on a single return or a joint?

"A. A single. The net receipts for Missoula, Montana, show it. [95]

"Q. I don't remember whether you had sugar refineries in any of the Rocky Mountain or Pacific Coast states other than Montana or Colorado.

"A. We do not have."

The next is item 7, which is on page 34.

"Q. Now, referring to the same letter, page 40 of the answer to the interrogatories, commencing at line 2, the portion which reads: 'A limited tonnage which permits Oxnard at all times to operate to capacity can be shipped from your area,' did that refer to the shipping of sugar beets from the Delta Region of the Sacramento and San Joaquin Rivers to Oxnard? "A. It did.

(Deposition of H. E. Zitkowski.)

“Q. Who determined when such shipments would be made on behalf of the company?

“A. A joint consultation or discussion between our manager at Oxnard, manager at Clarksburg, myself; probably Mr. Wilds, our president, got into the discussions, and there may have been still other gentlemen.”

Item 8 is at page 51.

“Q. Now, I wish to call your attention, Mr. Zitkowski, to a letter of November 6, 1939, from you to Lester J. Holmes, which is found commencing at page 52 of the answers to the interrogatories, and I call your attention to the second paragraph which reads: ‘Concerning the first objection which [96] refers to an average net selling price for the sugar produced in Northern California, I think you yourself understand the principles behind this very thoroughly. The principal objection therein is to obtain as far as this is possible a higher average net receipt for sugar by avoiding as much as possible cutthroat competition, cross-haul of sugar, and other similar practices, all of which tend to depress the receipts of sugar and benefit principally the transportation companies and some of the dealers in sugar, to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets.’ I call your attention to the expression ‘cross-haul of sugar.’ To what did you refer by ‘cross-haul of sugar’?

“A. Well, what I had in mind was sugar from

(Deposition of H. E. Zitkowski.)

some other processor or some other factory than the American Crystal Sugar Company, going by or through or in the neighborhood of Clarksburg, and we, in turn, also, in order to find sufficient of customers to dispose of our crop would have to haul sugar greater distances and behind the production centers of possibly Holly, possibly Spreckels Sugar Company, which, as I intimated, I believe is just to the benefit of the transportation companies.”

Item 9 starts at page 53, the last question.

“Q. Now, then, with reference to the expression ‘cutthroat competition,’ what particular cutthroat competition [97] were you referring to?

“A. Oh, stealing one another’s customers.

“Q. You mean by customers, growers of beets, or just purchasers of sugar?

“A. Purchasers of sugar.

“Q. Now, how would the use of an average net selling price in any way affect the stealing or taking of the other companies’ purchasers of sugar?

“A. I can’t answer how it affected it. As I stated earlier, I am not a sugar sales expert nor authority, and have never had anything to do with the sale of sugar.”

Item 10 is at page 55.

“Q. And when you replied to Mr. Holmes concerning his objection, did you not do it so that he could pass the information on to various growers who raised these objections?

“A. That, undoubtedly, was one of the reasons.

(Deposition of H. E. Zitkowski.)

“Q. What other reason was there?

“A. To allay Mr. Holmes’ own fears or objections.

“Q. Now, in this same letter of November 6, 1939, where it makes reference to a benefit to ‘some of the dealers in sugar,’ what particular dealers in sugar were you referring to when you, in effect, stated that the former system in effect in Central California was to the benefit of the dealers? [98]

“A. Well, if some sugar company made some dealer a special concession below the market, it was to the benefit of the dealer and the detriment of the grower or processor of sugar beets.

“Q. When you referred to the principal objective of this new method of paying in Central California, were you referring to cutting out these special prices to some dealers?

“A. The inferences there, I had nothing to do with sugar sales or the establishment of prices, so I was not speaking from first-hand knowledge.

“Q. Then, when you wrote this letter you were speaking from information given you by someone else in Crystal?

“A. In all probability, that is correct.

“Q. And who was that person or persons?

“A. Well, our sales people and all those that had anything directly to do with our sales policy.

“Q. When you say your sales policy and your sales people, you are referring to the persons who were selling the sugar after it was manufactured into sugar, and the policy in connection with the sale thereof, is that correct?

(Deposition of H. E. Zitkowski.)

“A. That is correct.

“Q. Now, in this letter, in this same paragraph, where it refers to depressing the receipts for sugar and benefits principally the transportation companies, were you there referring to the transportation companies who transported the [99] beets or the transportation companies who transported the sugar?

“A. Sugar is what I had in mind, in all probability.”

The next is on page 78, commencing at the last line.

“Q. Is it true that there were certain growers in the lower San Joaquin Valley who signed contracts with the American Crystal Sugar Company, Oxnard plant, whose farms were very close to the 36th parallel, some immediately north, and some immediately south? A. That's true.

“Q. If we took Central California as being that portion of California which included San Joaquin County, Sacramento County, and counties adjoining those two counties, would that cover the portion of California that entered into contracts with the Clarksburg factory?

“A. Adjoining what two counties?

“Q. San Joaquin and Sacramento.

“A. Yes, that is true.

“Q. Then, in the extreme southern part of the San Joaquin Valley, the growers who there dealt with Crystal, dealt with Crystal's Oxnard factory, is that correct? “A. That is correct.

(Deposition of H. E. Zitkowski.)

“Q. Now, then, in the same portion of the San Joaquin Valley, the southern portion, there were certain growers that dealt with Union Sugar Company, is that correct? [100]

“A. In southern San Joaquin?

“Q. Valley. “A. Valley?

“Q. Yes.

“A. I don't think that is correct.

“Q. Then, the growers who are referred to in the answer to Interrogatory 82-C, which appears at page 194 of the answers, reference is there made to the Union Sugar Company factory at Betteravia, California, which processed beets which were grown in California north of the 36th parallel. Now, where were those beets grown?

“A. In the Salinas Valley.

“Q. In what part of the Salinas Valley?

“A. Up and down that valley.

“Q. But, as far as you know, none of them were grown in the San Joaquin Valley?

“A. I don't know about those years. The Union Sugar Company, at one time, grew some beets in the San Joaquin Valley, but not in the southern or extreme southern portion, as you put it, of the San Joaquin Valley, but whether any growers grew beets for the Union Sugar Company in the San Joaquin Valley in 1939, 1940 or 1941, I can't state from memory.

“Q. Now, as far as you know, did the Union Sugar Company, during the cropping year 1939, 1940 or 1941, buy any [101] beets from beet growers in the San Joaquin or Sacramento delta country?

(Deposition of H. E. Zitkowski.)

“A. I do not know, from my knowledge.

“Q. Is it correct to state that you know of none?

“A. No, I know at one time they grew beets in the San Joaquin Valley, which they subsequently abandoned, but I don't know from memory what year. It was about that period of time.

“Q. Were you, in 1939, 1940 or 1941, a director of the American Crystal Sugar Company?

“A. I think that is correct.

“Q. Now, at that meeting of the board of directors of the American Crystal Sugar Company that you attended, was there any discussion of the change in form of the contract used by Clarksburg factory from the 1938 form, in which there was payment to the growers, based upon the average net return of Crystal alone, to the 1939 form, in which the return was based upon the average of Crystal, Holly and Spreckels?

“A. Well, I can't recall specifically any meeting in 1938 where the subject was discussed, but it is customary for the board to consider the beet purchase agreements, and they probably did in 1938.

“Q. Is there any reference in any minutes of the board to that subject?

“A. There may well be. [102]

“Q. Have you any recollection on the subject?

“A. I believe it is customary for the board to pass resolutions finally approving the beet purchase agreements.

“Q. But, aside from a resolution approving the beet purchase agreements, was there any discussion

(Deposition of H. E. Zitkowski.)

or resolution as to the reasons for the change in method from the single return to the joint?

“A. I can’t recall.”

The next is item 12, which starts at page 82, the last line.

“Q. Now, in answer to Interrogatory 88, which is found at page 195 of the answers to the interrogatories, the answer starts: ‘The idea of determining the price to be paid by processors for sugar beets in part on the basis of average net returns received for sugar sold from more than one factory has an historical basis.’ Was that historical basis there referred to the use of such a method in Southern California and the use in Southern Colorado?

“A. Yes, and elsewhere.

“Q. Had that been used elsewhere by Crystal prior to 1939? “A. Oh, yes, in Colorado.

“Q. I mean, other than Colorado and Southern California.

“A. Joint net with our own plants. [103]

“Q. I am referring to plants of other companies.

“A. Yes.

“Q. Now, did that occur other than in Southern California and in Colorado?

“A. Only in Southern California and Colorado, as far as the American Crystal is concerned.

“Q. When did it start in Southern California?

“A. It dates back to World War No. 1.

“Q. All I asked is when it started.

(Deposition of H. E. Zitkowski.)

“A. I am trying to answer you. The present form of contract in Southern California, I believe, dates back to 1917.

“Q. When you say present form, do you mean the form now in use or the form used in 1939, 1940 and 1941?

“A. Well, I mean the joint net settlement basis.

“Q. Okay. That dates back to when?

“A. 1917.

“Q. Is that still being used in Southern California? “A. No.

“Q. When was it stopped in Southern California?

“A. It stopped with the 1942 crop.

“Q. Now, in answer to this Interrogatory 88, and on page 196, the following appears, commencing at line 1 on page 196: ‘Some time in the fall of 1938 or the winter of 1939, Mr. Herman Zitkowski, Vice-president and General Manager [104] of Crystal, discussed the matter with Mr. Carl Moroney, vice-president of Spreckels Sugar Company, Mr. Carl Fisk of Holly Sugar Corporation, and Mr. Lester J. Holmes, manager of Crystal’s Clarksburg factory.’ Where did that discussion take place?

“A. Well, it is a long time ago. I believe it was at Clarksburg; it may have been in Sacramento.

“Q. Was any memorandum kept of what was said at that time?

“A. No, not that I know of.

“Q. How long was that before the idea was adopted by Crystal? “A. I don’t know.

“Q. Now, was this meeting held before or after

(Deposition of H. E. Zitkowski.)

the returns for 1938 crops had been made public in Northern California?

"A. Oh, it was well before the return from the 1938 crop.

"Q. Was it before or after the returns from the 1937 crop had been made public?

"A. Probably after the returns from the 1937 crop had been made public.

"Q. Now, the returns from the 1937 crop were made public in August, 1938, is that correct?

"A. In August, 1938. [105]

"Q. So, then, you would state that this meeting took place some time after August, 1938?

"A. Yes.

"Q. Now, what was said at this meeting?

"A. As a matter of fact, we, I recall, met with a committee of beet growers, and discussed the proposed joint settlement basis.

"Q. Was this meeting with growers before or after you had this meeting with Mr. Moroney, Mr. Fisk and Mr. Holmes?

"A. It was at the time of the meeting with the growers, when we explained the procedure to a committee of growers.

"Q. Now, before you had this meeting with the committee of growers, did you have any discussion with Mr. Moroney, Mr. Fisk or Mr. Holmes?

"A. Oh, I had frequent discussions with Mr. Moroney. I mean, I met him often.

"Q. I mean, with reference to this idea of de-

(Deposition of H. E. Zitkowski.)

termining the price to be paid on the basis of average net returns.

“A. I don’t recall such other meetings with Mr. Moroney, and I say that for the reason that the matter of sales policy was not determined by me.

“Q. Then, at the time that you attended this meeting with the growers, at which Mr. Moroney and Mr. Fisk and Mr. Holmes were present, the sales department of Crystal had already determined on this new method for 1939, isn’t that correct? [106]

“A. Well, I would say it had recommended that we follow that policy as we did in other territories.

“Q. Now, who told you this decision of the sales department?

“A. Undoubtedly, the president of the company.

“Q. That is, Mr. Wilds?

“A. Mr. Wilds.

“Q. Then, you were told of the decision after the decision had been made by the sales department and approved by Mr. Wilds, is that correct?

“A. I didn’t put it just that way. A recommendation had been made by the sales department, or by the sales policy, which was in frequent discussion, because we had been proceeding on that sort of a method for more than 25 years, or maybe I am wrong about the 25. Since 1917 to 1938; that is 21 years, I guess; and we were doing the same thing in Colorado, and were settling on a joint factory net in our Iowa and southern Minnesota territory, so it was just an accepted condition under which we had been operating for many, many years.

(Deposition of H. E. Zitkowski.)

“Q. So, the Iowa and southern Minnesota territory was based upon factories owned by Crystal and no one else, isn’t that correct?

“A. That is correct. [107]

“Q. Then, at the time this meeting was held with the growers, following August, 1938, the sales department already recommended the joint return contract? “A. That is correct.

“Q. And prior to that meeting, the sales department had already taken the matter up with Spreckels and Holly to see if it was satisfactory to them?

“A. Well, I don’t know who talked with who, or how the approach was made.

“Q. But, in any event, the approach had been made prior to this meeting with the growers?

“A. That is correct, the recommendation had been made prior to the meeting with the growers, and it was our job to inform the growers of the intent and purposes.

“Q. And prior to this meeting with the growers, the okay had been secured from Spreckels and Holly to have this plan go into effect?

“A. Well, the okay; I don’t know what you mean by okay.

“Q. I will put it in a different way. Crystal could not have put this plan into effect unless it was consented to by Holly and Spreckels, isn’t that correct?

“A. I don’t think Crystal initiated the proposal.

“Q. Who initiated it.

“A. I don’t know. [108]

“Q. In any event, it was initiated prior to the

(Deposition of H. E. Zitkowski.)

time of this meeting that you have testified about with the growers? “A. That is right.

“Q. And regardless of who initiated it, it was recommended by the sales department of Crystal and was approved by Holly and Spreckels prior to this meeting with the growers?

“A. It was recommended to us prior to that time.

“Q. When you say ‘to us,’ you mean to Holmes and yourself?

“A. Yes, the operating department.”

Then on page 97 is item 13:

“Q. I don’t think you understand to what I am referring. In the contract for 1938 for Clarksburg, the grower was paid on a formula in which one of the variables was the average net return of Crystal from the sale of sugar. That is correct, isn’t it?

“A. That is correct.

“Q. Now, the gross sales of sugar as shown on the return made to the growers included only the sales from sugar itself and did not include the sales from molasses or pulp, dried or wet, isn’t that correct? “A. That is correct.

“Q. Now, then, were growers in any part of the country, other than California, paid upon a formula on which the sales [109] return from either sugar or something else was one of the elements entering into the price?

“The Witness: Will you read that question?

“(Last question repeated by the reporter.)

“A. I would not call it a formula. The sentence you just read referring to Woodland, a Woodland

(Deposition of H. E. Zitkowski.)

meeting, is a formula, because it assumes an extraction, but there are or were areas in the United States where the net returns from the actual sugar made per ton of beets were divided equally, and that applies also to the net returns for pulp and molasses.

“Q. In what areas did that occur during 1939, 1940 and 1941?

“A. What we call the Michigan area.

“Q. Did that occur in any other area besides the Michigan area?

“A. We speak of the Michigan area as all of that area, Michigan being the center thereof, including Ohio, Indiana and, I believe, Wisconsin, but the principal production is in Michigan.”

Mr. Works: Pardon me. May our standing objection run to these other states, too, Your Honor?

The Court: You may have that standing objection, as I stated before.

Mr. Arndt: “Q. What other areas did Crystal have for [110] the purchasing of beets in 1939, 1940 and 1941? “A. What other areas?

“Q. Other than California, Colorado, Michigan, describing Michigan as you have described it.

“A. We purchased no beets in Michigan. We don't operate in Michigan.

“Q. Then, when you were speaking about the Michigan area, you were speaking of how other companies purchased beets, is that it?

“A. That is correct. I believe that is what your question was.

(Deposition of H. E. Zitkowski.)

“Q. Pardon me. Did Crystal use that method which was used in the Michigan area in any of its purchasing? “A. No, sir.

“Q. Now, do you know any other area of the country other than what you referred to as the Michigan area in which this method was used whereby the growers received half of the net return of the sugar and of the pulp and molasses?

“A. There is a small company in southern Colorado that has two forms of contract, one such as I referred to in the Michigan area and the other identical with our southern Colorado beet purchase contract.

“Q. And what was the name of that company, or is the name?

“A. The National Sugar Manufacturing Company.” [111]

Then we have item 14, which starts at page 112.

“Q. Then, would it be a fair statement to state that, from 1938 through 1945, the efficiency of the Clarksburg plant, insofar as the percentage of sugar extraction was concerned, was approximately constant? “A. Approximately constant.”

That completes the deposition of Mr. Zitkowski.

The Court: Is there going to be any direct evidence from either side in this case as to the whys and wherefores of the change from the 1938 basis to the form of contract in question in this suit?

Mr. Arndt: I have taken the deposition of every officer of the company.

The Court: What I am trying to get at is this. Is there going to be a question of inference, or is there going to be somebody that is going to testify as to what they did it? For instance, in this deposition here, they talk about a growers meeting. What I am naturally interested in is the motive behind the change-over. You have taken these various depositions, but I don't know what is in them. I have just asked the question.

Mr. Arndt: Every person has denied it in connection with Crystal.

The Court: Then why read the depositions?

Mr. Arndt: To show that. I have taken the deposition [112] of every officer, except the chairman of the board, who was in Europe, and I couldn't get him.

Mr. Works: How could you say everybody denied knowing anything about it, when you just read Mr. Zitkowski's testimony of where they met with the growers and discussed the whole thing with them?

Mr. Arndt: I assumed the court was referring to any further testimony than that.

The Court: One of the things I am interested in is when you changed your form of contract, your method of figuring prices, there must have been a reason for it, some economic reason I assume. Is there any direct evidence as to why the change was made in the method of doing business?

Mr. Arndt: Mr. Wilds, in his deposition, gives one explanation.

The Court: Of course, I don't know what these

depositions have in them, but I have another question to ask. You talk about the pulp and molasses as not being included in the receipts at Clarksburg. Did the growers receive that under the 1938 contract?

Mr. Works: No.

Mr. Arndt: No, Your Honor.

The Court: Then it wasn't customary to take that into consideration, was it?

Mr. Works: The American Crystal has never paid off on [113] that basis. I suppose that is taken into consideration in making up the sugar content. It may be that they get a higher percentage because of that.

Mr. Arndt: As a matter of fact, I think they get a lower percentage than they do at Oxnard, where they have the Steffens plant, which does extract the sugar from the molasses. It works just the opposite, Your Honor.

The Court: The point I am making is, as far as the violation of the Antitrust Act is concerned, where is that feature material? That might be a question under your accounting angle, but there is just one change in your contract.

Mr. Arndt: That is right.

The Court: And that is the average, instead of the actual payment. If that plant never paid on that basis, would that be a consideration in this suit? When I say "this suit," I mean the antitrust angle.

Mr. Works: I don't think it has anything to do with the antitrust count, Your Honor.

Mr. Arndt: The evidence will show, your Honor,

that in this section of the Arkansas Valley in Colorado, there were three sugar companies, Holly, Spreckels, and an independent. Holly and Spreckels bought on a joint return. The independent paid on 50 per cent of sugar, molasses and pulp. There, where the independent was competing against the combine, it paid on that basis. [114]

The Court: I know, but that is Colorado.

Mr. Arndt: That is the only place we have the combine operating against an independent.

The Court: The point I am making is this. When you come down to it, the damages of the plaintiff, if any, must be based upon what he would have received, or they would have received, had there not been this agreement.

Mr. Arndt: Yes, your Honor.

The Court: I think in the statement in court before, it was stated the Clarksburg plant was virtually the only desirable outlet for the plaintiffs.

Mr. Arndt: Clarksburg or Oxnard, because probably half our stuff went to Oxnard, as it was.

Mr. Works: You must include Union, which was not in this.

Mr. Arndt: Union was in the Southern California combine. Union only took Salinas during these years. Union was part of the Southern California combine. Union had the joint return in Southern California with the others.

The Court: Well, if they shipped to Oxnard, that was at additional cost.



United States
Court of Appeals
for the Ninth Circuit

AMERICAN CRYSTAL SUGAR COMPANY, a
corporation,

Appellant,

vs.

MANDEVILLE ISLAND FARMS, INC., a corporation,
ROSCOE C. ZUCKERMAN and G. K.
EVANS,

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Transcript of Record

In Two Volumes

Volume II

(Pages 401 to 817)

Appeal from the United States District Court
for the Southern District of California
Central Division

No. 12946

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Mr. Arndt: But Crystal did ship into Oxnard, and Crystal did pay the additional cost.

Mr. Works: We stood the freight of all these Oxnard shipments. It didn't cost them anything. [115]

The Court: What I am getting at is this: From an economical point of view, Clarksburg was the most economical outlet, was it not?

Mr. Arndt: That depends.

The Court: That is in dispute, is it?

Mr. Arndt: Yes.

The Court: All right. We will take five minutes recess.

(Recess.)

Mr. Works: I don't think we answered one question which your Honor asked before the adjournment. That is the reason as to why these things were done. We shall have evidence along that line, your Honor.

Mr. Arndt: We intend to argue from certain evidence as to what the reason was, too, your Honor.

The Court: I realize that, but I was trying to ascertain whether there was any direct testimony, or whether we would have to rely on inferences drawn from certain facts.

Mr. Arndt: In the same manner, I wish to read portions of the deposition of Lester J. Holmes. Item 1 commences on page 2 of his deposition.

“Q. What is your name, please?

“A. Lester J. Holmes.

(Deposition of Lester J. Holmes.)

“Q. What is your connection with the American Crystal Sugar Company? [116]

“A. Manager of the Clarksburg factory.

“Q. How long have you been manager of the Clarksburg factory?

“A. Since it was built. I started in the course of construction by Amalgamated Sugar Company in 1934. However, the American Crystal didn't take it over until '36.

“Q. Was the American Crystal Company operating in California at the same time the Amalgamated was operating, or did it succeed to or acquire Amalgamated?

“A. Well, it was operating in Oxnard, but acquired the Clarksburg plant in an interchange with Amalgamated in 1936.

“Q. Then when Crystal took over the Clarksburg plant, you then became connected for the first time with Crystal?

“A. Directly, yes.

“Q. Was Amalgamated a subsidiary of Crystal or a separately-owned company, as far as you know?

“A. Well, not exactly a subsidiary. They had pooled their interests in earlier years, and then subsequently withdrew, each taking back their separate interests.

“Q. Now, in this case, certain interrogatories have been answered on behalf of the defendant herein, and in connection with these interrogatories certain intercompany correspondence has been furnished. Now, I want to show you a [117] copy of a

(Deposition of Lester J. Holmes.)

letter which appears on page 24 of the answers to the interrogatory and purports to be a copy of a letter from Lester J. Holmes to Denver office, attention of H. E. Zitkowski, and ask you to read that.

“Now, have you read that letter?”

“A. Yes.

“Q. I call your attention to this portion of the letter in the second paragraph, in which there is reference to a freight absorption. What is a freight absorption?”

“A. This is a freight absorption referred to in which sugar is moved from the factory to the point of destination. That is strictly on sugar.”

No. 2 starts on page 4.

“Q. Explain how this freight absorption arose.

“A. Well, let me put it this way, first, that I do not handle any of the sales end of it, so I am not entirely competent to discuss that, only having just general knowledge of the plan. [118]

“Q. Then when you received this letter of September 12, 1938, that referred to a freight absorption, did you have any idea what it meant?”

“A. Oh, yes. I am not trying to hedge the question.

“Q. What did it mean to you when you received the letter?”

“A. It means that where sugar is sold at any distance from the factory, there is a freight absorption into other territories in which the final net to the grower is arrived at under the provisions of the contract. If the sugar is sold locally there is more return to the grower. If sugar has to be transported to the

(Deposition of Lester J. Holmes.)

far east there is a deduction for freight, which is taken into account.

“Q. Who handled the sales of sugar from the Clarksburg factory during 1939, '40 and '41?

“A. I believe we had our own company office set up in San Francisco in those years, although I would have to check that.

“Q. Who was in charge of that office?

“A. Mr. Hardy.

“Q. What was his first name?

“A. M. C. Hardy.

“Q. What was his title or office with the company? [119]

“A. Sales manager, western division.

“Q. Is he connected with the company at the present time? “A. Yes.

“Q. Where is he located?

“A. San Francisco. May I correct that name? His name is M. W. Hardy, not M. C.

“Q. Then he is the man who had charge of sales during those particular years, is that correct?

“A. To the best of my knowledge.

“Q. Now, where this letter goes on to state that the grower stood 50 per cent of the freight absorption, just in what manner did the grower stand 50 per cent of any freight absorption?

“A. At a certain point in the contract the assumption is that the proceeds of the sale of sugar are theoretically arrived at by a 50-50 basis. Therefore any charges that would arrive from the sale of sugar at a far destination would be used in determining the net

(Deposition of Lester J. Holmes.)

return to the grower.

“Q. Now, what do you mean when you say a certain point in the contract?

“A. I believe that it was around three and a half cents per hundred net. I would have to refer to the contract definitely to prove that. [120]

“Q. Now, was any sugar that was manufactured from sugar beets at the Clarksburg factory shipped to Southern California for sale?

“A. I would have no record—no knowledge of that.

“Q. That is something that this gentleman from San Francisco would know about.

“A. That is right.

“Q. Then when you wrote to the Denver office and made reference to freight absorption, you merely had a general knowledge that in certain instance there was an absorption of freight, and in certain instances there was not an absorption of freight, is that correct?

“A. That is right, yes.

“Q. When you wrote this letter you assumed that where there was a freight absorption the grower stood approximately 50 per cent of the freight and the company stood approximately 50 per cent of it, is that correct?

“A. That is correct.”

Now question or item No. 3 on page 7:

“Q. Now, you refer to this 50 per cent as being at approximately 3.5 in the contract. Now, when the return was above or below 3.5 how much off the 50 per cent situation was it?

(Deposition of Lester J. Holmes.)

“A. I don’t recall the percentage at all. I [121] would have to do some figuring on that.

“Q. Did it vary as much as 25 or 30 per cent from the 50 per cent?

“A. Oh, no. It may be 49 per cent, it may be 51, it may be 52. In some cases it got down, I think, to 48.

“Q. But for practical purposes when you discussed these contracts during 1939, ’40 and ’41 with the growers, you discussed it on the basis that approximately 50 per cent of the net return from sugar sales went to the grower, and approximately 50 per cent went to the refiner, regardless of what the particular percentage was, whether it was 3.5 or some other return, is that correct?

“A. I think we could say that is approximately correct.

“Q. Now, isn’t it a fact that these contracts that were used in 1939, 1940 and 1941 were often referred to by you as 50-50 contracts?

“A. Yes, I probably did.

“Q. Weren’t they often referred to by the growers as 50-50 contracts?

“A. On the sale—on the net returns from sugar, yes.

“Q. Now, in this same letter there is a reference [122] to competition with cane. Now does that cane refer to sugar produced from sugar cane?

“A. Yes.

“Q. Now, in 1939, 1940 and 1941, did Crystal produce any sugar in California from sugar cane?

“A. No.

“Q. Did Spreckels?

(Deposition of Lester J. Holmes.)

“A. They own the Sea Island plant, which is a part of the Spreckels Sugar Company.

“Q. Did Holly?

“A. Not to my knowledge.”

Now, item 4 starts on page 10:

“Q. Did you have anything to do with the discussions among any of the officers of Crystal in which the decision was reached to use this method of pooling net returns during the years 1939, 1940 and 1941?

“A. May I ask that again? Did I have any part in the decision?

“Q. Yes.

“A. I would answer that—I would say I had no definite part in the decision, although I was consulted and my advice given to Mr. Zitkowski.

“Q. When were you consulted?

“A. Well, I presume that was when we first [123] started to bring the matter up. I have no definite recollection as to dates or anything.

“Q. Now, as manager of the Clarksburg plant just what were your duties during 1939 and 1940 and 1941?

“A. My duties were to make the ordinary contacts, handle the company business and generally all the agricultural contacts that were made in that line of business, but I did not have anything to do directly with the operating of the sales division.

“Q. All the contacts then with the growers were handled by you, is that correct?

(Deposition of Lester J. Holmes.)

“A. That is right.

“Q. All questions of sign-up of growers or things of that sort were handled by you?

“A. That is right.”

Now, item 5 starts on page 13:

“Q. Now, I call your attention to line 30, page 26, and line 1 on page 27 of these answers to the interrogatories, which is a part of the same letter. This particular portion reads:

‘In other words, we should proceed on the assumption that we will not take other companies’ growers.’

“Q. Did you ever receive any instructions from Mr. Zitkowski or Mr. Wilds or anyone else connected [124] with Crystal to the contrary of this particular statement that I have quoted?

“Mr. Works: What page and line is that?

Mr. Arndt: Page 26, line 30.

“Mr. Works: The question was, did you ever receive any instructions to the contrary of that statement, if you know?

“The Witness: I don’t recall of any.

“Mr. Arndt: Q. You mean by that, you don’t recall whether you did or not or that you don’t recall that you did receive any such statements?

“A. I don’t recall that I did receive any such statements.

“Q. The best of your recollection is that you received no instructions to the contrary, is that correct?

“A. That is right.”

Then item 6 starts on page 14:

“Q. Now on page 34 there is a copy of a letter

(Deposition of Lester J. Holmes.)

from you to Mr. Zitkowski, dated October 12, 1939, and commencing at paragraph 23 it states:

‘In paragraph 5 there is a growing demand that the companies pay on their individual sales net rather than on the net of all factories.’

‘Now, is it true that prior to October 12, [125] 1939, there was a growing demand among the beet growers with whom Crystal dealt in Northern California that the companies pay on the individual sales net rather than on the net of all factories?’

“A. Yes.

“Q. Now, on page 45 of these interrogatories——on page 44 of these interrogatories starts a letter from Mr. Zitkowski to you, dated October 20, 1939, and on page 45, beginning at line 26, the following sentence:

‘There is also a limit to the tonnage we can transfer to Oxnard and under conditions existing this year we have exceeded that limit of the tonnage that can, without cost to the company, be transferred.’

‘Who determined whether the sugar beets grown in Northern California and contracted to Clarksburg should be refined at Clarksburg or refined at Oxnard?’

“A. That was determined through consultation with the Denver office and the Oxnard manager, Mr. Rooney.

“Q. Now, explain what is meant by the words ‘there is also a limit to the tonnage we can transfer to Oxnard.’ What was that limit in 1939, ’40 and ’41?

“A. It would be the operating efficiency of the Oxnard mill. In other words if the Oxnard mill was not

(Deposition of Lester J. Holmes.)

running to capacity it cost a certain amount per [126] day to operate and we could ship a tonnage of beets down there, assuming that the overhead would pay part of the freight cost, and that is the limiting factor. When you get above that point, why, then, you begin to run into another expense.

“Q. During 1939, '40 and '41 which beets came to maturity, ready for harvesting first, those grown in Northern California or those grown in Southern California?

“A. Ordinarily, Southern California-San Joaquin Valley comes in first.

“Q. Now, when you say ‘San Joaquin Valley’ do you include San Joaquin County where the Mandeville and Zuckerman and Evans beets were raised?

“A. No, I do not.

“Q. What do you include?

“A. I would say that we roughly consider the Bakersfield area, Wasco, and that area in there.

“Q. Then what would come in next? Which section of the state?

“A. Speaking of the state, we would, in the Sacramento area come in, generally, about 30 days later than the Oxnard area.

“Q. Now, the Southern California coastal area, what did that include? What portion of the [127] state?

“A. I am not entirely familiar with that, but I would say as far as Santa Maria.

“Q. Now then did the Oxnard factory commence its refining operations before or after or at the same

(Deposition of Lester J. Holmes.)

time as the Clarksburg factory during 1939, 1940 and 1941?

“A. I couldn’t answer as to the start without referring to some facts about it, but I will say we were operating during September and October at the same time.

“Q. Now, is it true that there was a more or less fixed overhead of charges at the Oxnard plant and at the Clarksburg plant so that the greater tonnage of beets that were handled at either place meant a less overhead cost per unit of beets?

“A. That is right.

“Q. Then the purpose of sending beets from San Joaquin County, for example, to Oxnard was to reduce the unit overhead at Oxnard, is that correct?

“A. Not entirely.

“Q. All right. What other purpose was there, then?

“A. If we had more beets than we could efficiently handle at the Clarksburg plant in order to get them out in the proper season in order to expedite harvesting, we sent the beets to Oxnard rather than to delay [128] harvest in the island.

“Q. Now, in connection with the Mandeville and Zuckerman beets, the answers to the interrogatories specify a particular amount of tons that were shipped each year to the Oxnard plant, but insofar as the Evans beets are concerned, the interrogatories merely state the Evans’ beets were mingled with other beets and it is impossible to tell what particular tonnage of

(Deposition of Lester J. Holmes.)

the Evans' beets went to Oxnard. Now, will you explain how that difference happened?

"A. The Mandeville beets were the only beets grown on Mandeville that year. That is, in other words, we had the entire contract on Mandeville Island. On American Island where the Evans beets were grown these were several other growers, all delivering beets at the same time and loading onto the same barge, so it was impossible, after we had received them, to follow that particular bunch of beets through, and we have no records as of this date as to whether all of those beets came to Clarksburg or whether the barges were delivered to Stockton and then shipped to Oxnard.

"Q. Now, when the Zuckerman beets were sent to Oxnard were they loaded at Mandeville on barges and the barges then taken to Stockton where they were trans-shipped to freight cars? [129]

"A. Freight cars—to gondola or sugar beet racks, whichever was furnished.

"Q. When I speak about freight cars, I am not referring to a particular type of car.

"A. Yes, I see.

"Q. I am merely referring to the particular type of transportation.

"A. By rail. They were shipped by rail.

"Q. By rail, yes. Were the growers informed at any time as to whether their beets were to go to Clarksburg or to Oxnard during those particular years? "A. No."

(Deposition of Lester J. Holmes.)

No. 7 is on page 24:

“Q. Now, referring to a letter that commences on page 49, which is a copy of a letter from Mr. Holmes to Mr. Zitkowski, the first paragraph refers to a meeting between Frank and yourself. Now, who was Frank?

“A. Frank Cleveland, agricultural superintendent.

“Q. It refers to a meeting held ‘last night.’ Was a meeting held on October 30, 1939, between Frank and yourself with a growers’ committee of the Central California Beet Growers Association?

“A. I presume that is right, held October 30th.

“Q. Now in your letter you state, commencing with [130] line 15:

“ ‘The first objection was that the agreement providing for net selling price based upon the average of the three companies is entirely wrong in principle and this should be stricken out.’ ”

“Was that there stated by the growers’ committee at that meeting?

“A. Presumably so.

“Mr. Works: Mr. Arndt, at this time may I advise the witness that he may refresh his recollection with reference to these letters?

“Mr. Arndt: Oh, yes.

“Mr. Works: You have that right.

“Mr. Arndt: Well, I assumed that he had them.

“Mr. Works: Instead of presuming. you may re-

(Deposition of Lester J. Holmes.)

fresh your recollection according to the letter as to whether it did or did not happen.

“The Witness: Oh, well, it specifically is stated in here that they were opposed to the joint net.

“Mr. Arndt: Q. Now, in line 24 of the same page 49, it says:

‘As far as I can ascertain this feeling is general.’

“With your memory refreshed by that, is it true that as far as you could ascertain on October 31st, 1939, [131] there was a general feeling among the growers that the agreement providing for net selling price based upon the average of the three companies was wrong in principle and should be stricken out?

“A. Yes.

“Q. Now, I next call your attention to lines 27 to 29 of the same page:

“‘However, they were rather outspoken in their condemnation of the policy with other companies.’

“Did that also refer to this same provision of net selling price based upon the average of the three companies? “A. Yes.

“Q. Now, on page 52 commences a letter dated November 6, 1939, from Zitkowski to yourself. Would you look over that copy of that letter, please, with particular reference to the second paragraph?

“A. Yes.

“Q. Now, I call your attention to the following:
“‘The principal objection there is to attain, as far as this is possible, a higher average net receipt for sugar by avoiding as much as possible cut-throat com-

(Deposition of Lester J. Holmes.)

petition, cross-haul of sugar and other similar practices.'

"What cut-throat competition did you know of at [132] that time?

"A. As I stated before, I have no dealings with the sugar sales department.

"Q. So then that meant nothing to you at all, is that right?

"A. That is right.

"Q. Now, where it said 'cross-haul of sugar', did that mean anything to you?

"A. Only in general terms.

"Q. Then when it said 'other similar practices' did that mean anything to you?

"A. No.

"Q. Now, referring to the first sentence of that same paragraph where it says:

" 'Concerning the first objection which refers to an average net selling price for the sugar produced in Southern California, I think you, yourself, understand the principles behind this very thoroughly.'

"Now, had you ever discussed with Mr. Zitkowski or Mr. Wilds the principle behind this average net selling price? "A. Yes.

"Q. When?

"A. What was that?

"Q. When had you discussed it? [133]

"A. When we first talked about putting the plan into operation.

"Q. When was that?

"A. I believe it was in 1938."

(Deposition of Lester J. Holmes.)

The next is on page 30, line 16:

“Q. I see. Now, on page 59 is a letter from Holmes to Zitkowski and I call your attention to the last paragraph on page 59, which states:

“‘I believe there are two things to which the growers chiefly object. The first is the net sales price based on the average of these three companies, and the other is the deduction of one-half per cent for each five cents below \$3.25. They feel that the 50-50 contract should be carried in the lower bracket.’

“Now, where reference is there made to the 50-50 contract does that refer to the standard, printed contract of Crystal of the same type as Mandeville and Zuckerman had?

“A. That is right, the same contract.

“Q. Now, with your memory refreshed by that letter, is it true that on September 27, 1940, the growers in Northern California were objecting to a net sales price based on the average of the three companies? “A. Yes. [134]

“Q. Now, continuing to read from this same letter, line 29, page 60:

“‘As far as I can find out, there was no demand for 50 per cent of the pulp and molasses, although at Woodland I noticed in the paper they demand 50 per cent of the sugar on a 92 per cent extraction, and also 50 per cent of the pulp and molasses.’

“Now, was any molasses made from the sugar beets at the Clarksburg factory during '39, '40, and '41?

“Oh, yes.

“Q. Was that sold by the company?

(Deposition of Lester J. Holmes.)

"A. Yes.

"Q. Was any of the pulp from which the sugar was extracted sold by the company?

"A. Yes.

"Q. Now then as I understand the 50-50 contract in use during 1939, '40 and '41, in arriving at the particular figures that were used on a 50 per cent basis, all that was taken was 50 per cent of the net return of sugar and nothing was allowed the grower in the price for any return from molasses or pulp, is that correct?

"A. That is correct."

The next is on page 35, line 10:

"Q. Well, was there any competition between [135] Oxnard plant of Crystal and Clarksburg plant of Crystal for growers?

"A. No."

Then on page 36 line 3:

"Q. Who had charge of the growers sign-up at Clarksburg during 1939, '40 and '41?

"A. I was not responsible for it.

"Q. So whatever was done was done under your general supervision or by you?

"A. That is right."

Item 11 starts at line 13 on page 36:

"Q. Were the shipments that were made to Clarksburg all made by water transportation?

"A. Oh, no. The biggest percentage of them comes in by truck.

"Q. Were any of them sent in by freight?

(Deposition of Lester J. Holmes.)

“A. No.

“Q. Now, insofar as the Mandeville Islands were consigned, did those all come in by water transportation?

“A. Those that came in to Clarksburg came by water.

“Q. Now, were there any beets grown in San Joaquin County that did not come by water during those years? “A. No.

“Q. Now, the cost of shipping to Clarksburg was [136] paid by whom?

“A. The company paid that.

“Q. The cost of freight to Oxnard of the northern California beets was paid by whom?

“A. The company.

“Q. Now, in connection with these freight and water hauling charges, were any of those charged by the company to the grower?

“A. None whatever.

“Q. In determining the net return, were any of these freight or hauling charges included?

“A. No.

“Q. Now, in connection with the sale of the sugar itself, was the freight involved in the sugar sales, if any, deducted from the gross return in determining the net return of the sugar sales?

“A. Yes.”

That completes the Holmes deposition.

The next deposition is the Hardy deposition, Myron W. Hardy. I start at page 4 line 8:

“Q. What is your name?

(Deposition of Myron W. Hardy.)

“A. Hardy.

“Q. Your first name, please?

“A. Myron W.

“Q. Where do you reside? [137]

“A. Orinda, California.

“Q. Where is that with reference to San Francisco?

“A. Well, it is—I will say it is about 15 miles northwest or northeast.

“Q. In Marin County?

“A. Contra Costa County.

“Q. What is your occupation, Mr. Hardy?

“A. Western salesmanager.

“Q. For whom?

“A. American Crystal Sugar Company.

“Q. How long have you been western salesmanager?

“A. Since 1937 or 1938, I am not sure.

“Q. During that period of time have your headquarters been located in San Francisco?

“A. Part of the time and part of the time in Los Angeles.

“Q. When was it in Los Angeles?

“A. 1939 through 1941 and the spring of 1942.

“Q. Then prior to 1939 and subsequent to the spring of 1942 your headquarters have been in San Francisco?

“A. That is right.

“Q. Now, you spoke about the western territory. What does that include?

“A. That includes the State of California, Ari-

(Deposition of Myron W. Hardy.)

zona, Oregon, Washington, Montana, Idaho and Nevada. [138]

“Q. Now, does American Crystal have any other sales territory other than the western territory?

“A. Yes. We have the eastern sales territory.

“Q. What does that include?

“A. Wherever they might offer sugar in the eastern territory. Generally speaking it would be Chicago and west of the Rocky Mountains.

“Q. Now, during the period of time that you were sales manager of the western division was there also a salesmanager of the eastern division?

“A. Yes.

“Q. Was there a salesmanager over the two divisions? “A. No.

“Q. Was there a sales head over the two divisions?

“A. The president of the company.

“Q. Then you reported directly to the president of the company, is that correct?

“A. That is correct.

“Q. During this period of time that you were head of the western sales was there a general manager of the company?

“A. Yes.

“Q. Was that Mr. Zitkowski? “A. Yes.

“Q. Did you at any time take instructions from or [139] report to him in connection with your duties? “A. No.

“Q. And you reported directly to the president, is that correct?

“A. Up to the last year.

(Deposition of Myron W. Hardy.)

"Q. That is, up to 1948, is that it?

"A. Yes.

"Q. What time in 1948?

"A. Well, I couldn't tell you exactly. I am guessing at 1948.

"Q. Well, could it have been 1947?

"A. Probably could. I don't recall. I know it was in the last year or two years that they had a general salesmanager.

"Q. Did they have one in 1939? "A. No.

"Q. 1940? "A. No.

"Q. 1941? "A. No.

"Q. 1942? "A. No.

"Q. Now, in connection with your duties as western salesmanager did you handle the sale of sugar?

"A. Yes. [140]

"Q. Did you handle the sale of anything else except sugar? "A. Yes.

"Q. What?

"A. Dried beet pulp and molasses.

"Q. Was there anything else besides dried beet pulp, molasses and sugar that you handled?

"A. No."

Now, No. 2 started on page 10 at line 10:

"Q. During the years that you were salesmanager Crystal manufactured beets into sugar at two factories in California, isn't that correct?

"A. That is right.

"Q. Now, where else did they manufacture sugar in your territory?

"A. Montana.

(Deposition of Myron W. Hardy.)

“Q. Where in Montana?

“A. Missoula, Montana.

“Q. Who gave the instructions for the shipping of sugar from Missoula, from Oxnard and from Clarksburg?

“A. Shipping where?

“Q. Anywhere from there?

“A. Well, if it was in the Pacific Coast territory I gave the instructions for the shipment.”

Now, No. 3 starts at page 17, line 9: [141]

“Q. When sales were made in the eastern territory which were filled by California produced sugar, were those sales made by you or under your direction or were they made by someone else in the company?

“A. Made by someone else in the company.

“Q. Who determined whether or not California sugar would be shipped to fill an eastern order?

“A. That would be the management in Denver.

“Q. Were you consulted in connection with sales of California sugar in the eastern market?

“A. No.

“Q. How were you informed about such sales?

“A. From the factory shipping records, daily reports.

“Q. Well, then, is it correct to state that the first time you knew that any California sugar had been sold in the eastern territory was when you received a copy from the factory of the shipping report, is that correct?

“A. That is correct.”

(Deposition of Myron W. Hardy.)

The next starts on page 25 at line 16:

“Q. Were you ever present at a discussion at which Mr. Zitkowski was present, or any other officer of American Crystal, in which the subject under [142] discussion was whether or not the price to be paid the growers should be based upon the average net return of the sales of all the factories in northern California rather than the average net return of the particular factory to whom the growers’ beets were sent for manufacturing into sugar?”

“A. No.

“Q. Were you ever present at any discussion with anyone connected with Holly Sugar or Spreckels Sugar on that subject?”

“A. No.”

The next starts at page 32.

Mr. Works: Do you mind, in order to save time reading line 3 to 11 on page 26 so we won’t spoil the continuity?

Mr. Arndt: That is part of your case but I have no objection to doing it:

“Q. Did you at any time know that commencing with the crop year 1939 and continuing through 1939, 1940 and 1941 the contract generally used by Crystal in that portion of California which shipped beets to its Clarksburg factory paid for the beets upon a formula in which one of the variables was the average net return from the sale of sugar of all of the factories in California north of the 36th parallel?”

“A. No.” [143]

(Deposition of Myron W. Hardy.)

It that the part you wanted?

Mr. Works: Yes, thank you.

Mr. Arndt: Now, on page 32, commencing at line 17:

“Q. Did you ever take any recommendations, either orally or in writing, to the Denver office or anyone connected with the American Crystal on the subject of cross-haul of sugar or avoiding cross-haul of sugar?”

“A. No.”

The Court: Mr. Arndt, how is this pertinent?

Mr. Arndt: I will explain it to your Honor.

The Court: I can't see where it has anything to do with this lawsuit.

Mr. Arndt: Our position is this, your Honor, that the purpose of having the joint arrangement was part of a plan which developed as follows:

During the year 1938 Crystal sales of sugar were mainly in the western parts of the United States and as a result they had a very small charge for freight.

The other companies sold a lot of their sugar elsewhere and had a very high charge for freight. As a result Crystal had a much better net return for the growers than the other companies so the other companies said to Crystal:

“You have got to stop this. We can't compete with you if this continues. What we have got to do is to work this along so we all pay the same and that you have got to start [144] shipping your sugar east so your freight will go up and you will have the same kind of freight that we do.”

(Deposition of Myron W. Hardy.)

That was all that I intended showing by this deposition. That is all this deposition will show, that all shipments of sugar which were made outside of the western territory was made upon orders from the president. He is the man who handled it.

The Court: May I ask this question? Is it your contention that the efficiency or the net returns to the growers were reduced by anything else other than the difference in freight?

Mr. Arndt: That item is the largest item of expense and of the deductions that we can distinctly prove from the figures. In other words, here we have the situation of——

The Court: I understand that. Just wait a minute. You answered one question and yet you haven't answered it to my satisfaction. You answer it like a lawyer generally answers a question and I am probably asking questions like a judge usually asks them, but what I am trying to get at is whether there is any other item in their operation, anything else in their operation other than the freight item that affects the grower. You can answer that yes or no.

Mr. Arndt: Yes.

The Court: All right, what are they? What are the other items? I am trying to get them fixed in my mind. [145]

Mr. Works: We can give you a break-down of that at any time.

The Court: I want to find out what the items are. You say the operations were not as efficient as they should be. That is a general term to me.

(Deposition of Myron W. Hardy.)

Mr. Arndt: This is the one item that we can specifically point to in dollars and cents and specifically show this particular freight item as showing either absolutely in efficiency during that period or an absolute agreement to make them all equal—one or the other.

The Court: Let us take the item of freight.

Mr. Arndt: Yes.

The Court: What else did it result in as far as the operation of this plant is concerned? You don't claim the operators of the plant were careless in its operation?

Mr. Arndt: The operation of the plant has nothing to do with it. [146]

The Court: The inefficiency is in the——

Mr. Arndt: The storage and the method of selling. Storage, and there is freight and there is the sales expense. Those are the items that go into it and the largest of all, the largest by far is this item of freight.

The Court: You say storage.

Mr. Arndt: Yes, storage.

The Court: Where would that enter into it?

Mr. Arndt: In other words, if they carry over from one year to the other, thousands of tons of sugar, that bears a storage charge. That storage charge is charged to the growers of one particular crop year who get no benefit at all from any increase in price resulting from holding that sugar over into the next crop year.

The Court: Is there any item outside of the freight that when you come to break it down and divide it up

(Deposition of Myron W. Hardy.)

and spread it over all their operations that justifies the time it takes to establish that item?

Mr. Arndt: I am not going to attempt to establish them, your Honor. I am going to leave them entirely to inference. I am establishing the freight situation very definitely, but I am not spending any amount of time on the other items specifically.

The Court: You may proceed.

Mr. Arndt: Item 6 is on page 33, line 3: [147]

“Q. Would you ever make a written report or write a letter or send a telegram or make any written document with reference to competition or cross-haul of sugar?

“A. No, as far as cross-haul is concerned, the subject has never come up in my time.

“Q. How about competition?

“A. Competition? Probably so.

“Q. What form did that take?

“A. I wouldn't without—I wouldn't know from memory. It might have been in letter form. It might have been in telegram, it might have been telephone.

“Q. Is it your recollection that there were any such documents?

“A. No, I couldn't recall any particular document.

“Q. Well, I didn't ask you to recall a particular document. I just asked you whether you recall that there ever was any such document?

“A. No, no.

“Q. Then your answer is that it is to the best of

(Deposition of Myron W. Hardy.)

your recollection there was never any such document?

“A. There may have been.

“Q. Oh, I see.

“A. I don’t know.

“Q. Well, let me get you clear. In other words, you are now stating that you do not remember any particular [148] document, you do not remember whether there was any such document, but you will not state that there wasn’t, because there might have been? “A. There might have been.

“Q. Now, is that a correct resume of your position? “A. That is right.

“Q. Okay. Now, you have made reference to the sale of beet pulp. Did you receive instructions from Denver as to such sales?

“A. As far as price was concerned, yes.

“Q. Did you have anything to do with the instructions regarding the shipment of beet pulp from Clarksburg to Oxnard?

“A. There never was any beet pulp shipped from Clarksburg to Oxnard.

“Q. Did you have anything to do with any instructions regarding the shipment of molasses from Clarksburg to Oxnard?

“A. No.

“Q. Who handled that?

“A. The operating department.

“Q. Did you have anything to do with the sale of molasses? “A. Yes.

(Deposition of Myron W. Hardy.)

“A. When you speak about the operating department, [149] what department do you mean by that?

“A. The department headed by Zitkowski.

“Q. So that department then determined what molasses would be shipped from Clarksburg to Oxnard, and what molasses would be sold, is that correct?

“A. No, they determined the amount that would be shipped to Oxnard for processing.

“Q. Who determined the amount that would be sold?

“A. That would be the balance, the difference between the production and what was shipped to Oxnard.

“Q. Then as I understand it you had nothing whatsoever to do with that portion of the molasses that was shipped from Clarksburg to Oxnard?

“A. Nothing whatever.

“Q. And you do not know whether Oxnard was charged and Clarksburg was credited with any particular amount as to that? “A. No.

“Q. That was a matter that was handled by Mr. Zitkowski's department, is that correct?

“A. That is correct.”

The next is on page 37, line 10:

“Q. But, in any event, during the years 1937, 1938, 1939, 1940 and 1941 Crystal did have either a list or a selling price? [150]

“A. Undoubtedly.

“Q. And was that issued by your office or by Denver or by somebody else?

(Deposition of Myron W. Hardy.)

“A. By the Denver office.

“Q. Insofar as these lists were concerned, when they were received by your San Francisco office, what happened to them?

“A. They were kept in the current file until—not more than a year. There may be numerous changes during a year and it would be quite a bulky affair.

“Q. What happened to them at the end of the year? “A. No.

“Q. Pardon? “A. No, I don’t.

“Q. I said what happened.

“A. What happened to them?

“Q. Yes.

“A. They were destroyed, as far as we were concerned out here.

“Q. Then, as I understand it, during these particular years, 1937, 1938, 1939, 1940 and 1941 the Denver office from time to time issued the list prices at which you were to sell, is that correct?

“A. Yes.

“Q. Now, was that a maximum or a minimum price or a [151] flat price you were to sell at?

“A. Oh, that was a list price. The selling price might be entirely different.

“Q. Who gave you instructions as to changing the list price to a selling price?

“A. That was—the instructions would come from Denver.

“Q. Did you have any discretion yourself on that subject? “A. Discretion?

(Deposition of Myron W. Hardy.)

“Q. Discretion. “A. No.

“Q. So that any change from the list price came only upon specific instructions from Denver.

“A. That is correct.

“Q. And those specific instructions, I understand, came from Mr. Wilds, the president?

“A. Mr. Wilds in those years.

“Q. Pardon?

“A. Mr. Wilds during those years.

“Q. Now, referring to these documents which you say are destroyed, did they show the price for San Francisco or did they show a price for other locations other than San Francisco?

“A. Your price is the same—that is for the—your [152] list price is the same for the entire Pacific Coast territory. It would cover all the Pacific Coast. What we term Pacific Coast would include the Northwest and Arizona.

“Q. Did you ever sell sugar in Spokane for the same price as you sold sugar on the same day in San Francisco? “A. No.

“Q. Then explain what you meant by saying you had a list price which was the same for the entire Pacific Coast.

“A. That was your list. Under your basing point system or pricing, in preparing your list price you show only the price at the nearest seaboard refinery.

“Q. And then the nearest seaboard refinery during those years was San Francisco, is that correct?

“A. Yes.

(Deposition of Myron W. Hardy.)

“Q. And you so showed, then, on your list price the San Francisco price?”

“The Witness: That is right.”

The next is on page 40 at line 15:

“Q. Now, you have referred to the basing point or base point price system. Will you explain what you meant by that expression when you used it?”

“A. That is the price that the cane people establish at the refinery at seaboard, which price is arrived at by determining their delivered price on raw sugar from Cuba or wherever it might be, the point of origin, and their cost of [153] refining and they arrive at that base price at that point.

“Q. And then insofar as the United States was concerned were there three such base points, New York, New Orleans, and San Francisco?”

“A. Yes, in addition to some more.

“Q. What others were there?”

“A. Definitely I couldn't say, but I believe there was more on the eastern seaboard than you mention.

“Q. Well then, when sugar was shipped from California to the eastern seaboard was the sale based upon the eastern seaboard base price or upon the San Francisco base price?”

“A. I don't believe any sugar was shipped from California to the eastern seaboard in that period of time.

“Q. Was any sugar shipped from California to the midwest during that period of time?”

“A. I don't know.

“Q. Well, now, you spoke about some sugar be-

(Deposition of Myron W. Hardy.)

ing shipped from California into the eastern territory. What part of the eastern territory were you referring to?

“A. That would be the territory of Chicago west to the Rocky Mountains. [154]

“Q. Well, then, when sugar was shipped into that territory was the price based upon whichever had the smaller freight haul from destination to the eastern seaboard or the western seaboard?

“A. I don't know, because the pricing of sugar delivered in that territory was handled by someone else.

“Q. That was handled by whom?

“A. The Denver office, as far as I know.

“Q. So that when sales were made in the eastern territory you had nothing to do with the price whatsoever? “A. No.

“Q. Now, you have informed us that the price was fixed by Denver insofar as sales in the western territory was concerned; that is correct, is it not?

“A. Yes.

“Q. And you also have informed us that Denver issued a list price which used San Francisco as the basing point?

“A. For this territory, yes.

“Q. Did you ever have any general instructions as to what you were to add to or subtract from this San Francisco base point on sales made outside of San Francisco?

“A. Yes, if you used the base pointing system

(Deposition of Myron W. Hardy.)

you would naturally use the freight applied from San Francisco to the point of destination.

“Q. Now, isn’t it a fact that in the absence of specific [155] instructions to the contrary that is the method you used in your sales during those periods of time?

“A. That would be an ideal situation.

“Q. Isn’t that true as to what happened, in the absence of instructions to the contrary?

“A. That is right.

“Mr. Whyte: I want to be sure that the witness understands your question. Actually did the price of sugar at the point of sale in all cases equal the base price at San Francisco plus the freight to any destination?

“The Witness: No.

“Mr. Arndt: He has already testified that it didn’t.

“The Witness: No.

“Mr. Arndt: The question I asked him was: In the absence of specific instructions to the contrary they applied the base point system; that in various cases he had specific instructions to the contrary, and when he had specific instructions to the contrary then he did not apply that system.

“The Witness: I understand the question to mean that we had a formula for selling at various destinations that we could use if there was—the price at that destination was not less than the base price plus the freight.

“Mr. Arndt: That is right.

(Deposition of Myron W. Hardy.)

“Mr. Whyte: I am just as anxious to understand this as you are. [156]

“Mr. Arndt: Q. And those were your general instructions? “A. Yes.

“Q. And then when you found out that due to competition you could not get that price, then if you wanted to make the sale, you got in touch with Denver and got authority? “A. That’s correct.

“Q. And I think you also testified that in so far as you remember that authority was usually given by telephone?

“A. Usually, yes. In cases of that kind there is an element of time enters into it. You have to use the telephone.”

The next is at page 47, beginning at line 23. This is still Myron W. Hardy.

“Q. Now, I want to be sure I understand one other matter. Did you ever receive any instructions authorizing you to sell a given amount of sugar in a given year within your territory, or did you have to get approval of every sale that was made from Denver?

“A. Well, I could answer that in this way: That I made up sales estimates, which I submitted for a full crop year to Denver for their approval, and if they wanted to change it they had the privilege of doing so.

“Q. How often was that done?

“A. I do it every month. [157]

“Q. What are these documents called?

“A. Estimated sales.

(Deposition of Myron W. Hardy.)

“Q. Would Denver either specifically approve it, or did they tacitly approve it by not objecting to it, or would they object? What was the mechanism?

“A. For instance, we were going to sell, we will say, one million bags of sugar in a period of a crop year from both Oxnard and Clarksburg in California and the Pacific Northwest. They may say: No, you are not going to sell all of that. We are going to take some of that, probably into Arizona. We might take some into Nebraska, so we will cut your estimate down by the amount that they desired to.

“Q. The figure to which they cut it down, you had authority to sell that amount anywhere in your territory?

“A. Yes, not all at once. I have the authority to sell, I will sell, in an orderly manner over a period of months, so much each month.

“Q. I thought you filed it for each month.

“A. I do. I file it for each month showing the estimate sales for this—we will say for the month of August—

“Q. Yes.

“A. —then the estimated sales from September through July next year.

“Q. In other words, then, you do show all of that on the same report? [158]

“A. Yes.

“Q. And then if no objection was raised, then that was your authority to sell that amount of sugar in the orderly manner?

“A. Yes.

“Q. And if you could sell it at the base point system plus freight, you needed no further authority.

(Deposition of Myron W. Hardy.)

“A. If I could get more than that for it, why, that was fine with them.

“Q. But if you wanted to sell under it you had to get specific authority? “A. That is right.”

That completes the testimony of that deposition.

The Court: Now, I am going to ask you, after reading that, what have you established by it, in your opinion?

Mr. Arndt: I have established by that that Denver handled all sales made of Clarksburg or Oxnard sugar outside of the western area, and that when sales were made from this area that were for delivery to these places where the freight was expensive, it was done upon orders from Denver. We tie that in with the figures that we will produce showing what happened as soon as this went into effect, this conspiracy went into effect; that during the years 1938, 1939 and 1940, Crystal's own individual cost of freight jumped a way up, and as soon as the conspiracy was over, it jumped down again, [159] not only in dollars and cents but in percentages.

The Court: You read an awful lot of deposition to establish that one item you are driving at, Mr. Arndt. I don't know whether I can hold out or not. I think you are reading a lot there that doesn't tend to establish anything one way or the other. You say you established there that the sales outside of this particular area were controlled by Denver.

Mr. Arndt: No, that any sugar sold for delivery outside of this area, from this area, was controlled by Denver, and that sales were made on the San Fran-

cisco base point, which meant that as you went further from San Francisco, there was more and more freight, you paid more and more freight.

The Court: I am getting what you are driving at, but we have to take such a long trip to get there.

Mr. Arndt: I know we do, your Honor. That is one of the unfortunate things when we are dealing with a situation where no one knows anything they did and everybody denies having any knowledge of what happened or why it was done. We have this letter, in which they say——

The Court: But you read a lot of questions and answers which you introduce without reading all of the depositions, and I am sure that if you went over it again, you would eliminate half the questions that you did read.

Mr. Arndt: That is possible. I don't know when your Honor wants to stop. [160]

The Court: I think I am going to quit now. How many more depositions have you?

Mr. Arndt: The rest of the depositions are very brief. There are six depositions, but altogether they will not take as much time as the Zitkowski deposition took, because for the most part they said they did not know anything about it.

The Court: Why don't you get down to that and read that and have it over with? I have to finish this case this week, gentlemen, as far as the taking of evidence and the reading into the record is concerned, because I have other commitments. The only reason you got all this week is the fact that a case for Thursday and Friday blew up, as we say here.

Mr. Arndt: I will do my best, your Honor.

The Court: I think there should be some shorter method to get that, because I am going to have to do so much reading when it is all in, anyhow. I don't know whether the defendant intends to introduce the balance of the depositions or not.

Mr. Works: Well, your Honor, I heard your remark earlier. It seems to me most of this material clutters up the record, but if your Honor would like to have them all——

The Court: No. I am not asking for them.

Mr. Arndt: I think I will save considerable time by [161] picking out extracts, rather than reading them all in.

Mr. Works: That is the theory on which I have been operating.

The Court: You intend to go through the depositions again and read parts of them?

Mr. Works: We have taken no depositions.

The Court: I mean parts of the same ones.

Mr. Works: I don't think so.

The Court: The only thing is, I have been listening here all afternoon. I have tried to be patient about it. Somebody my impatience becomes apparent. But in listening to the questions and answers, you still haven't got down to the meat. In other words, we spent quite a bit of time on this last deposition, and I think that with a half dozen questions you could have stipulated to what he testified to. As to the others, I don't know, but I think you could stipulate on the testimony.

I think perhaps I will ask counsel what he expects

to prove by that deposition to see whether we can stipulate.

Mr. Arndt: I have furnished them with a list, so I am not taking them by surprise.

Mr. Works: No, I don't say we are taken by surprise.

The Court: I am not saying you are, either. I presume you wouldn't dispute this man testified he had his orders from Denver and he was working under them. [162]

Mr. Works: There is no mystery about it. Mr. Arndt was very diligent in asking for stipulations and we would have stipulated to these things, as well as a lot of other things we agreed to.

The Court: Well, we will take an adjournment until Thursday morning at 10:00 o'clock.

(Thereupon, an adjournment was taken until 10:00 o'clock a. m., Thursday, February 23, 1950.)

Los Angeles, California,
Thursday, February 23, 1950, 10 A.M.

Mr. Arndt: If the court please, at our last session a question came up regarding the method of handling the particular interrogatories and answers the plaintiff desires to use. At that time the understanding and order was that I would have them copied and then present them.

Since that time, I feel that we would have a more uniform method if the reporter did that, and I have collected together all of the interrogatories followed by the respective answers cut out directly from the interrogatories and from the answers, and I would

like to have the order changed so that the reporter can have them copied, so we will have a uniform situation instead of having something that my office would prepare which might not at all agree with the way the reporter is doing it.

The Court: Whichever is satisfactory to counsel.

Mr. Works: That is quite all right, counsel.

The Court: It is very difficult, and I think you gentlemen appreciate it more when you come to read it that when you are working with a transcript and working with interrogatories and in another document find the answers, and you have to check back and forth, it makes it a very difficult task.

Mr. Works: It is much better this way, I think. [165]

Mr. Arndt: So I will present them, then, to the reporter.

The Court: That will be substituted for the questions and answers that you offered the other day—not as a substitute, but as an addition to and explanatory of the particular interrogatories that you put in the other day.

Mr. Arndt: That is correct, your Honor.

The Court: You don't expect the reporter to get that out for you today, do you?

Mr. Arndt: No, your Honor, because Mr. Works and I are going to have some additional stipulations, which probably won't be ready until next week or the week after, because he is getting certain data that I am stipulating to, and I am getting certain data that he is stipulating to, so in view of the fact we are

going to have briefs, we won't delay anything by that method.

I next offer, if the court please, certain portions of the deposition of Edgar E. Merrill. The first appears at page 2 of the deposition.

"Q. What is your name, please?

"A. Edgar E. Merrill.

"Q. Where do you reside?

"A. In Denver, Colorado.

"Q. What is your connection with American Crystal Sugar Company? [166]

"A. At present I am the auditor."

The next is starting toward the bottom of page 3.

"Q. Are you familiar with the various books of account and records of American Crystal Sugar Company? "A. Yes.

"Q. Are they under your general supervision at the present time? "A. That is right.

"Q. When you answered you were referring to accounting records? "A. That is right.

"Q. In front of you is volume entitled 'American Crystal Sugar Company, Analysis Ledger of Control Account, Fiscal Year ending March 31, 1942'. Is that a book of original entry?

"A. I would say it is. It is the ledger to which the analysis by factories of all journal entries is posted, concurrently with the posting to the control accounts in the general ledger.

"Q. As I understand the situation, there are certain journal entries made, and then these journal entries are combined for each factory and the combined figures, then, are, at certain intervals posted from the

(Deposition of Edgar E. Merrill.)

journal into this ledger? "A. That is right.

"Q. I notice this ledger is divided into various accounts. [167] Do these accounts show for Oxnard and Clarksburg the various amounts shown on these journals that you have spoken about?

"A. That is true, they do. [168]

"Q. How do the entries get into the journal?

"A. From the various sources, such as sugar invoices, sugar sales registers; in the case of the account you have before you, the excise tax on sugar sold. These journals charge this account and credit the liability account which is set up at the time sugar is manufactured.

"Q. When you said 'these journals' you were referring to an item under the heading 'source,' is that correct?

"A. Yes; those are the journal entry numbers.

"Q. Where 'source' appears, the figures under that are the journal entry numbers.

"A. That is right.

"Q. Now, this first account, which is worded, 'excise tax on sugar sold', does that show the excise tax on sugar sold from Oxnard and Clarksburg, as the case may be, during the various months that are herein set forth? "A. Yes.

"Q. I call your attention to the fact that from time to time certain penciled notations appear. Do those penciled notations show the addition of the figures that went before?

"A. Yes. Those are the accumulated footings for [169] the fiscal year.

(Deposition of Edgar E. Merrill.)

“Q. So that if, as of the end of July, we wanted to ascertain the totals for a given account in this book, we would take the penciled notations that follow the July entry and precede the August entry.

“A. That is correct.

“Q. So that, for example, this first account of excise tax on sugar sold, where the penciled entry of \$175,217.32 appears under Oxnard, that would represent as of the end of July the totals of excise tax paid on sugar sold from Oxnard.

“A. For that fiscal year.

“Q. For that fiscal year?

“A. And to that date.

“Q. And that would apply through the ledger?

“A. Yes.

“Q. Is this same system carried on uniformly throughout this ledger?

“A. Yes. The footings accumulate the totals from the beginning of the fiscal year to date, for each month throughout the year.”

The next is on page 19.

“Q. Now, this next heading is called ‘Pulp Sales,’ and the first one is the account, ‘Wet Pulp,’ [170] and there is no number, but it says, ‘Sales’ and this is only for Clarksburg. Does that represent the sale of wet pulp from Clarksburg during the period covered by this ledger? “A. Yes, it does.

“Q. Now, were these sales reflected in any way in the computation made under the growers’ contracts in the years from 1939 to 1942?

“A. I would say no, with the same qualification I

(Deposition of Edgar E. Merrill.)

made before, that these details I was not handling at that time.”

Mr. Works: May I request a stipulation at this point?

Mr. Arndt: Yes.

Mr. Works: The same items were not reflected in the computation made under the growers’ contracts in the years 1937 or 1938 either.

The Court: I understood from a statement made the other day that in the computation of the contracts that are not in dispute that practically the same practice was followed.

Mr. Arndt: That is true.

Mr. Works: I merely wanted to clarify that and counsel has so stipulated.

Mr. Arndt: I do now at any rate.

“Q. The next general heading is ‘Pulp Sales Expense.’ It says 870 to 872, inclusive. Now, referring to [171] Clarksburg, does this refer only to wet pulp?

“A. Yes, it refers only to the expense incurred in the sale of wet pulp.

“Q. Then, these show all the expenses that were incurred in that sale, is that correct?

“A. Yes.

“Q. Now, the next account is headed ‘Molasses Sales.’ Does that represent the sale of molasses from Oxnard and Clarksburg, as shown for those respective factories during this particular year?

“A. Yes.

“Q. Were these sales reflected in the computation

(Deposition of Edgar E. Merrill.)

made in connection with the payments to growers under the 1939, 1940 and 1941 contracts?

“A. With the same qualifications that I made in answering on wet pulp and dried pulp, I would say they were not.”

Mr. Works: May I have the same stipulation as to this testimony?

Mr. Arndt: Yes.

The Court: I thought it was stipulated to the other day.

Mr. Works: I didn't know how far it went.

The Court: I understood quite clearly that the principal change in their method of doing business was the [172] increase in freight by reason of these contracts. In other words, the item that you can put your finger on represents the excess freight over the previous contracts and subsequent contracts.

Mr. Arndt: As to the matter of expense, yes. There is another matter we will show and that is during these three years the shipments from Clarksburg to Oxnard greatly increased, but that is not a direct item of expense. That is an item on which we will make certain arguments. In other words, during this three-year period that affected the overhead, your Honor.

The Court: Of course, every time the grower got less money——

Mr. Arndt: So far as the shipments from Clarksburg to Oxnard were concerned that didn't work that way. When they shipped from Clarksburg to Oxnard, and let us say they shipped 15 per cent, which

(Deposition of Edgar E. Merrill.)

is the actual figure for some of these years, 15 per cent of the beets from Clarksburg to Oxnard, now in making the settlement to the grower they made the settlement to the grower based on the amount of beets he produced and that reflected the amount of sugar sold from Clarksburg.

Now, if 15 per cent of the beets, and presumably 15 per cent of the sugar was included in the Oxnard figures, the growers were being charged with an extra 15 per cent of [173] overhead that they would not have been charged if those beets had been processed in Clarksburg. And as to those beets that went to Clarksburg these growers had no benefit at all but the Crystal Company got the entire benefit.

Mr. Works: We will show that is absolutely incorrect.

The Court: Your point is this and correct me if I misunderstand, by the shipment of beets to Oxnard unless the Clarksburg plant was working at full efficiency their overhead would be increased by reason of not processing the beets at that point.

Mr. Arndt: That is right, their unit overhead.

Mr. Works: The overhead was not charged against the growers. We will show that these contracts carry their own method of figuring the net.

The Court: But I am trying to get Mr. Arndt's point of view.

Mr. Arndt: Now, for example, there were certain sales expenses. Those sales expenses included the expenses of the salary of this witness and various other expenses, office expense and so on.

(Deposition of Edgar E. Merrill.)

Now, if those expenses were charged only to the sugar that was produced from Clarksburg and wasn't charged to any sugar that was shipped—any of the sugar produced from our beets that were shipped south then our unit overhead naturally increased.

We will show that during the three years the amount of sugar practically doubled that was shipped from—pardon me, the amount of beets and as soon as it was over, as soon as the conspiracy was over it dropped again.

The Court: I presume your point is only well taken if it is true that the overhead was charged to the growers—that is the general overhead was charged as an item of expense to the growers. Also if that practice reduced the efficiency of the plant and it was not running at a reasonable capacity. If that were true there would be something to your point. That is your theory, is it not? I don't know whether I have stated it clearly.

Mr. Arndt: Yes, your Honor, and the fact that every pound of beets that was shipped to Oxnard and the sales thereof included in the Oxnard sales and not in our sales gave us a different fraction to work with, and when it amounts to 15 per cent it would make a substantial difference in the amount of money we would have received. [175]

The Court: Well, that also goes to the question of whether or not there was a surplus of beets in Clarksburg and whether they were in a position to handle all the beets that were produced there, doesn't it?

Mr. Arndt: That is correct.

(Deposition of Edgar E. Merrill.)

Mr. Works: And, your Honor, there is also this element. Those beets were bought and paid for f.o.b. Clarksburg. After they were bought, they were ours.

Mr. Arndt: Well, now——

Mr. Works: That question is implicit in the whole situation.

Mr. Arndt: Since counsel makes that statement, suppose they had shipped every beet except 100 pounds to Oxnard?

The Court: I get your point.

Mr. Arndt: According to him, they could have done it and we would have got nothing. All the overhead would have been charged against the 100 pounds, and yet Mr. Works says that is perfectly all right, that they are their beets.

Mr. Works: Even a hundred pounds would have set a measure whereby he would have been paid for his whole beet crop. Obviously, the situation he suggests is ridiculous, but he would have been paid for his entire crop, no matter where we shipped it.

Mr. Arndt: And against it would have been charged the San Francisco sales office and all [176] that.

The Court: Let's proceed, gentlemen. I follow you, I think.

Mr. Works: As to that question, I would like a stipulation from you, Mr. Arndt, that beets were shipped from Clarksburg to Oxnard in 1937, 1938 and 1942, and your client knew it all the time.

The Court: You mean before this three years?

Mr. Works: Yes, blanketing the three years.

(Deposition of Edgar E. Merrill.)

Mr. Arndt: I have the figures for 1938, and, I think, if you will furnish me the exact figures and tell me they are correct, I will stipulate. As to what my client knew, I will discuss that with him and we will stipulate as to what he tells me. He is here. He will be on the stand and you can ask him that question yourself, as far as that is concerned. As to the figures for 1937, 1938——

The Court: Let's proceed, gentlemen. I want to see some live witnesses.

Mr. Arndt: You see, your Honor, we are in the situation, as in most antitrust cases, where the evidence as to what happened is all in the defendant's hands. We have to produce from their own unwilling lips and from their own records as best we can what the situation is and draw inferences therefrom. Then it is up to them to explain various things that happened.

The Court: Let's proceed with this man's [177] testimony.

Mr. Arndt: All right. The next is a change in what is set forth in our schedule. This is at page 25 at the bottom.

"Q. Did you, yourself, at any time during 1937, 1938, 1939, 1940, 1941 or 1942, have any conversations with anyone connected with either Holly or Spreckels regarding change or proposed change of the form of contract to be used or used in the Clarksburg District for the purchase of beets by Crystal?

"A. No."

Mr. Works: What page is that, please?

(Deposition of Edgar E. Merrill.)

The Court: That is page 25.

Mr. Arndt: That is 25.

Mr. Works: Thank you.

Mr. Arndt (Continuing):

“Q. Did you yourself ever see any correspondence, documents, or telegrams referring to any such subject?

“Mr. Works: The subject being a change in the form of growers’ contract?

“Mr. Arndt: That is right.

“A. Only those papers that I have seen incidentally. I don’t recall the particulars of them. In other words, I have never had access to and read the papers that have been furnished in answer to the interrogatories.

“Q. And outside of what those papers might disclose, you yourself have no knowledge of any other documents? [178] “A. That is correct.”

That completes Mr. Merrill.

The next is Mr. Graham. I will state, your Honor, that the Graham, Wilds, Kraybill, Summerton and Hayden depositions are all bound together and the numbers start from the first.

The Court: Let me ask you this. In the auditor’s testimony, where does that add to anything here that hasn’t been virtually admitted? Where has it added anything to what we have already established?

Mr. Arndt: He has identified certain documents which will either go into evidence directly or we will have a stipulation as to what they show, except for the last part of his testimony.

The Court: He just denied knowing anything about the transaction.

Mr. Arndt: That is right.

The Court: That hasn't proven anything, has it?

Mr. Arndt: I think that these denials do prove something. They prove the utter unreliability of the witnesses of Crystal, because they all deny, every officer denies having any conversation or knowing anything about it. Somebody must have done it.

The Court: Counsel, let's get this straight. I realize that you are an advocate in this, the same as Mr. Works. Both of you have been living with this case, and particularly [179] you have been living with it, so long that you can't see anything right in anybody else but your side of the case, and you feel that everybody who testifies that doesn't testify the way you think is not to be relied upon. They have come into court and recognized that they had a meeting and agreed on this contract.

But the thing you haven't developed is why they made the change. At least, it hasn't been brought to my attention. You are going on the theory that during this three-year period that they changed their method whereby the grower received less money for his beets than he would have otherwise received. That is the main point that I am interested in, outside of the question of law. I want to get at these figures, and I mean actual figures.

Mr. Arndt: Your Honor, I can do no more than to take the deposition of every officer, and when every officer tells me, "I was not present, I know nothing about it," I think that we have——

The Court: Well, you had one or two witnesses here that testified they were present when they discussed this change of contract.

Mr. Works: That is correct.

The Court: This method of contract. It is true that you may not be able to develop the motive behind this change. It is also true that they abandoned it. I don't know why. [180]

Mr. Arndt: If the court please, let me review the testimony so far.

The Court: Let's not review that.

Mr. Arndt: Mr. Zitkowski testified that the sales department was the one who determined this, that he received this information from Mr. Wilds; that he had written this letter to Mr. Holmes marked "Confidential," which says the purpose of this is to prevent cutthroat competition, to prevent cross-haul of sugar, which benefits the transportation companies.

Mr. Zitkowski testified all of that applied to sugar and not to the beets themselves. None of this affected the growers. He testified that all that information came to him from Mr. Wilds, and that he knew nothing about those facts, because he was only in the production department, and that came to him before he told the growers what the new deal was going to be. It was all decided before that.

So then I will follow with Mr. Wilds, and he will say he had no conversation with anybody. Mr. Zitkowski has admitted no conversation with anybody.

The Court: Which am I going to believe and which am I not going to believe? How am I going to

pick out who is telling the truth? The parties are not before me.

Mr. Arndt: Your Honor, I can't bring them here.

The Court: I realize that. You started out [181] on one track, and you stay on that track, and I have been trying to get you switched off it, because I want to get down to the point of the element of damages.

Mr. Arndt: I know your Honor does. If Mr. Works would admit that there was a conspiracy and restraint of trade and that the sole matter was damages, we could do that, but he won't admit it.

The Court: I recognize that, but you have a Supreme Court decision. You have got your contract, and it is apparent that that was an agreement between the growers of that area. The fact is that it was also in the southern part of the state. They had that agreement. Now, if the Supreme Court decision can be interpreted, as I think it can be interpreted, that there was an unlawful agreement, what more do you want? You have got the law of the case. The Supreme Court has already held that. Now, if they stay with it or not, that is another problem.

Mr. Arndt: Mr. Works holds that is not what the decision holds, and from an abundance of caution, I am endeavoring to complete a case that will meet any objection of Mr. Works, as well as your and my interpretation of the decision.

Mr. Works: I think his Honor is trying to indicate to you as clearly as the English language will permit, that he is ready to find on both of those issues right now.

Mr. Arndt: I have no doubt about that, but, [182]

nevertheless, I want to present this record so that when Mr. Works starts taking a few shots at it, I will have it properly buttressed.

The Court: Why don't you introduce the whole deposition and have it over with then?

Mr. Arndt: As a matter of fact, there are very few matters left here.

The Court: The point is this, that you haven't yet answered Mr. Works' point, and that is that he claims the Supreme Court was dealing with sugar when, as a matter of fact, you are dealing with beets. Am I not correct in that?

Mr. Works: That is what the opinion says.

Mr. Arndt: That is not what the opinion says.

The Court: I know, but you are spending your time on sugar, when the commodity involved in this litigation is beets.

Mr. Works: That is right.

The Court: And the Supreme Court, they didn't say it, but in effect they held that when you dealt with beets, you were dealing with sugar.

Mr. Arndt: That is right.

The Court: And if that is true and that is what they meant by it, all the rest of this is a waste of effort.

Mr. Arndt: I must ask the court to be patient.

The Court: However, it is easier to listen to you than to have you go ahead and argue, so go ahead. You said it [183] wouldn't take you long to finish that feature of it.

Mr. Arndt: This is the deposition of Robert H. Graham.

(Deposition of Robert H. Graham.)

“Q. What is your name, please?

“A. Robert H. Graham.

“Q. You reside in Denver?

“A. Yes.

“Q. What has been your connection with American Crystal Sugar Company, to which I will hereafter refer to as Crystal?

“A. Well, the whole experience has been in the accounting department, starting in, of course, as clerk, then bookkeeper, assistant auditor, auditor, and now, manager of the tax department.”

The next is at page 37.

“Q. Now, Mr. Graham, did you ever have any conversation with anyone connected with Holly Sugar Corporation or Spreckels regarding contract or contracts or form thereof used or to be used between Crystal and the growers of sugar beets in California for the cropping years of 1939, 1940 and 1941?

“A. No.

“Q. Did you have any conversation with any person connected with either of those two companies regarding the change in the form of the contract used by Crystal for its Clarksburg operations from the form used in 1938 to the form used in the cropping year 1939? [184]

“A. No.

“Q. Did you ever have any discussion with any such persons regarding the reason for such change?

“A. No.

“Q. Did you ever have any discussion with any of such persons regarding the cross-haul of sugar produced at Clarksburg and Oxnard factories and

(Deposition of Robert H. Graham.)

sold between 1938 and 1943? "A. No.

"Q. Did you ever have any conversation with any such persons regarding competition or lack of competition or elimination of competition in connection with the sale of sugar? "A. No.

"Q. Were you ever present at any conversation at which any of those matters were discussed, whether that conversation was with persons connected with those companies or connected with Crystal, and I am referring to conversations occurring between 1938 and 1943, inclusive?

"A. No.

"Q. During those particular years from 1938 to 1943, inclusive, did you see any correspondence between Crystal and either of those two companies on any of those subjects? "A. No.

"Q. Are you acquainted with the location of the Colorado sugar factories of Crystal? [185]

"A. Yes.

"Q. Are you familiar with the location of their factories during the cropping years 1938 to 1943, inclusive? "A. Yes.

"Q. And where were they located in Colorado?

"A. Rocky Ford, Colorado.

"Q. Is that the only one?

"A. That is the only one.

"Q. Did they have any in the San Luis Valley District? "A. No factory there, no.

"Q. In other words, beets that were produced there and handled by Crystal were sent to the Rocky Ford factory, is that right?

(Deposition of Robert H. Graham.)

“A. Yes, that is right.

“Q. Is the Rocky Ford factory located in the Arkansas Valley? “A. Yes.

“Q. Is it located on the line of the Atchison, Topeka and Santa Fe Railway? “A. Yes.

“Q. Were there any other factories operated by any other company—— “A. Yes.

“Mr. Works: Where? [186]

“Q. Just let me finish the sentence. Were there any other factories operated by any other company in the Arkansas Valley in Colorado on the line of the Atchison, Topeka and Santa Fe Railway, during those years? “A. Yes.

“Q. And where were they located and who operated them?

“A. Swink, Colorado, operated by Holly Sugar Corporation.

“Q. Was that the only one?

“A. That is the only one on the Santa Fe Railroad.

“Q. How far was that from the Rocky Ford factory?

“A. I would say, five or six miles.

“Q. Were there other factories in the Arkansas Valley which are not located on the Santa Fe Railroad? “A. Yes.

“Q. Where were they and who operated them during those years?

“A. A factory located at Sugar City, Colorado, owned by the National Sugar Company.

“Q. Was that the only one?

(Deposition of Robert H. Graham.)

“A. That was the only one.

“Q. And how far was that located from the Rocky Ford factory? “A. 20 miles.” [187]

I will say, parenthetically, if the court please, the reason for the reference to the Santa Fe Railway is because the contract of Crystal refers to factories in the Arkansas Valley on the Santa Fe Railway. That is why the questions were asked regarding the Santa Fe Railway.

The next on page 46.

“Q. Now, with reference to the sugar that was produced from molasses by the Steffens process at the Oxnard plant, was that sugar accounted for in the books in a different way than the sugar which was produced directly from beets in the Oxnard plant? “A. No.

“Q. In other words, the sugar sales from the Oxnard plant reflected all sugar, whether it was manufactured by the Steffens process or any other process? “A. Yes.

“Q. And whether it came from sugar beets directly or came from molasses?

“A. That is right.”

Then on page 58. Well, I won't need to read that in, because that is covered by a stipulation.

The next is the deposition of Mr. Wilds.

Mr. Works: Your Honor, may we waive the deposition of Mr. Wilds for the reason that we intend to offer the whole thing in and it can be copied in the record and your Honor can [188] read it at your leisure.

The Court: Why don't you let him offer it in evidence and you offer your part, and it will be deemed read and then have it copied for the record?

Mr. Arndt: There is one matter there, your Honor, in which Mr. Wilds made a statement which we objected to as not being responsive in the deposition itself.

Mr. Works: That gives the information which your Honor wanted, the reason why this was done, as Mr. Wilds saw it. If you want to strike it out, it is all right with me. That is the evidence I was going to offer.

The Court: We are trying this without a jury. Let's get the facts in here, the whole picture. He will offer it.

Mr. Arndt: You see, I didn't cross examine Mr. Wilds regarding that particular statement. All right. I have no objection to it.

Mr. Works: His Honor can rule on your motion to strike it.

Mr. Arndt: We will waive the motion to strike.

The Court: When you come to the question of striking a piece of evidence, after all, out of all this I hope there will be a definite picture developed and that certain facts will appear, and from that, then, you can argue the inferences to be drawn. You have the testimony of these officers, and you have undoubtedly got records here as to the freight items [189] and the breakdown.

Mr. Arndt: I am going to show that.

The Court: I want to say that is one of the items that impressed me in the statement of counsel.

Mr. Works: We will give you all the figures on it.

The Court: The inference has been here, and it has been argued, that this change in arrangements was not brought about by reason of the desire of Crystal, but by reason of pressure from his competitors. That was the inference drawn the other day. As a result, Crystal lost by it, and the growers lost by it, because this additional freight you are talking about would be, not on a 50-50 basis, they called it that, that half of the freight would have to be carried by the grower and half by the processor, but that his client in effect, that is your client, was a victim of competition, pressure by competitors, in order to obtain a uniform practice, and that his clients suffered and you also suffered, but instead of you taking 50 per cent of the loss, you took 100 per cent. [190]

Mr. Arndt: That is right.

The Court: And then multiply by three.

Mr. Works: We expect to show, your Honor, since this subject came up, in 1939 and 1940, they had the greatest beet crops they have ever had in California, and the output was very nearly double what it had been before, so that there was such a surplus it had to be exported some place. However, that is a matter of evidence. I am giving something from which other inferences may be drawn now.

The Court: I am not making any conclusion, but I am going along and making comments so that you gentlemen will know a little bit of what I am thinking about, so you will know whether or not I am

getting the theories upon which you are introducing the evidence. .

Mr. Arndt: That is right.

Mr. Works: I can't help observing this, your Honor. We have been trying a so-called beet conspiracy case, that is, we have been having a beet conspiracy case for about four or five years now, and the day before yesterday, for the first time, we are charged with combining to abandon the California market in sugar. I don't know of anything in the pleadings on that issue, but we are not being technical about it and we will meet the issue. I would like to say right now, however, I regard this present theory of Mr. Arndt's as embodying a new and distinct cause of action, which has never [191] been alleged before. We pleaded the statute of limitations in the Sugarman case. We haven't in the Evans case, and I now ask leave to plead under 343 to any concerted conspiracy with regard to abandoning the California market.

The Court: I think the general charge covers pretty near everything, counsel. I have been talking all the time here and asking questions upon what theory and how we are going to arrive at damages, and this is the first time, when we got into this trial, that I knew that this was one of his theories. As I understand it, he has two or three theories, so that the court may reach out and grab a figure and it can be supported by evidence from any one of two or three theories.

Mr. Arndt: That is correct.

The Court: That is what he is doing.

Mr. Works: I would say four or five, according to my count, and there may be more.

Mr. Arndt: There may be more yet, too.

The Court: I don't know. They have what they paid before the first contract, what they paid after, and what they paid at Oxnard. Now, to my way of thinking, if he can establish this theory he is working on by substantial evidence, that is the most logical one to me.

Mr. Works: Well, that would mean taking the 1939, 1940 and 1941 computations and possibly adjusting the freight item. [192] That is where he is going, as I see it.

The Court: Whatever it may be, I don't know.

Mr. Works: Not that we agree with it.

The Court: I understand that, but if there is a change of method in the disposal of those beets during the particular period that this three-year contract was in existence over the method they had followed prior to that time and after that time, then it would look like there is something there to tie in to.

Mr. Works: And your Honor would want to know how come, and we shall do our best to show it.

Mr. Arndt: Insofar as this Wilds situation is concerned, in order to determine which we are presenting and which they are presenting——

The Court: Just read off the part you are going to offer, and to save time, permit him to introduce the balance.

Mr. Arndt: That is all right.

Mr. Works: That is fine. Then there may be one or two objections we have in there and I waive them.

(Deposition of W. N. Wilds.)

Mr. Arndt: Starting in at the commencement of the Wilds deposition, I will read the first portion that I am offering and then I will stop and then Mr. Works can go ahead, and then I will start in.

The Court: No. I think you should just call attention to the questions and answers you have indicated on your [193] paper that you are going to offer, and then he will offer the balance.

Mr. Works: That is right. I won't bother reading it.

Mr. Arndt: All right.

The Court: How long is it?

Mr. Arndt: The whole deposition of Mr. Wilds starts from page 67 and goes to page 94. That is the entire deposition.

Mr. Works: That would be 27.

Mr. Arndt: No, 28 pages, counting the first and last. [194]

Mr. Arndt: Then I won't read our portion, your Honor.

The Court: You can do as you please.

Mr. Arndt: Whichever way your Honor wants me to do it.

The Court: I don't care which way you do it. If you want to emphasize your point I would like to get your theory.

Mr. Arndt: Starting with the first question:

"Q. What is your name, please?

"A. W. N. Wilds.

"Q. Are you president of American Crystal Sugar Company? "A. That is correct.

(Deposition of W. N. Wilds.)

“Q. How long have you been president?

“A. The former president passed away the early part of October, 1933, and I carried on in the capacity of vice president until March, 1934, when I was elected president.

“Now, I assume you are familiar in general with the contract used by American Crystal Sugar Company in purchasing sugar beets for its Rocky Ford factory in Colorado? “A. Yes.

“Q. And I assume you are familiar with the provision of it that in 1938, 1939, 1940 and 1941 provided that the price per ton of the beets shall be determined on the average sugar content of the beets delivered under this contract and the average net return, as hereinafter defined, received for sugar sold by the factories located in the Arkansas Valley in Colorado, on the line of the Atchison, Topeka & Santa Fe [195] Railroad. How long had that form of contract been used at the Rocky Ford factory?

“A. Well, I can't answer that definitely, but for a number of years, I would say.

“Q. Now, referring to the year 1938, in the factories for which Crystal purchased beets other than California and other than Colorado, did Crystal use a form of contract in which the growers were paid upon a method in which the payment depended in part upon the return from more than one factory?

“A. Yes.

“Q. And where did that occur?

“A. Mason City, Iowa, in the northern part of the state, and Chaska, Minnesota, which is in the

(Deposition of W. N. Wilds.)

southern part of Minnesota. Those two plants drew beets partially from adjoining territories.

“Mr. Works: May I clarify that? You are referring to factories operated by the same company?”

“The Witness: The same company, yes.

“Q. In those two instances was the rate determined in part by a factory owned by any other company? “A. No.

“Q. And in any of the other factories operated by Crystal other than Colorado or California was the joint return method used? [196] “A. No.

“Q. Now, in reference to the Colorado situation, what other sugar beet company was included as having a factory in the Arkansas Valley in Colorado on the line of the Atchison, Topeka & Santa Fe Railroad?”

“A. The Holly Sugar Corporation.”

Then on page 70:

“Q. Did you have any conversation with anyone connected with Holly Sugar Corporation or Sprec-kels Sugar Company regarding the change in the form of contract used in the Clarksburg factory area from the 1938 method to the 1939 method?”

“A. Mr. Zitkowski was in charge of our agriculture——

“Mr. Works: The question is, whether you talked to anybody.

“The Witness: Oh, no, I don’t remember talking to a soul. I wouldn’t have had anything to do with it because he is the one that figured out the details.

(Deposition of W. N. Wilds.)

“Q. Then, insofar as Crystal was concerned, the decision to change from the 1938 form to the 1939 form in California was made by Mr. Zitkowski?

“A. No. He presented the facts to me, and I was the one that made the final decision.

“Q. When did he present the facts to you? [197]

“A. Just before the contract was issued. I can't remember the date.

“Q. Now, the minutes of the board of directors show that on October 3rd, 1938, the 1939 contracts for Oxnard and Clarksburg were approved.

“A. If that is what is shown in the minutes that is correct.

“Q. How long before that date did you have your first discussion on the subject with Mr. Zitkowski?

“A. Before we presented it to the board. Here is the plan: Mr. Zitkowski and his assistants worked out the details of these proposed contracts. They brought them to me and I made certain tests for my own personal information to see whether or not, under the scale contract proposed and the estimated amounts that we might receive from sugar, we could make a profit. If those short individual tests showed that we could not make a profit, then he had to do some more calculating.

“Q. I am particularly referring to the change from the 1938 to the 1939, in respect to the fact that the 1938 contract for Clarksburg provided the growers were to be paid upon the basis of the net returns from Clarksburg alone, while the 1939 contract provided that the growers who dealt with Crystal in

(Deposition of W. N. Wilds.)

the Clarksburg district, were to be paid upon the [198] joint net average return of all factories north of the 36th parallel in California. Now, it is that particular change that I am inquiring about.

“A. May I elaborate a little on that in giving you a reply?

“Q. I want to know whether you talked about that to anyone connected with Holly or Spreckels?

“A. No, no, I did not. I did not.”

The Court: These are all adverse witnesses, are they not?

Mr. Arndt: All of them, your Honor, every one is a witness for the other side.

The Court: Then you wouldn't be bound by any of their testimony, would you?

Mr. Arndt: That is correct, your Honor.

The Court: Then why don't you introduce that in evidence as the testimony of an adverse witness?

Mr. Arndt: I would rather Mr. Works put it in as his own witness.

The Court: All right, proceed.

Mr. Works: Are you through with Mr. Wilds now? Would it be out of order for me to offer the entire deposition including the parts Mr. Arndt just read?

The Court: Will it be printed in the record?

Mr. Works: That is what I had in mind, copying the [199] Wild deposition into the record as part of our case and he can have what he wants.

Mr. Arndt: There is no objection to that.

The Court: That will be the order and the entire

deposition will be deemed as read and copied into the record by the reporter.

(The deposition referred to is in words and figures as follows, to-wit:

“W. N. WILDS,

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Arndt:

Q. What is your name, please?

A. W. N. Wilds.

Q. Are you president of American Crystal Sugar Company? A. That is correct.

Q. How long have you been president?

A. The former president passed away the early part of October, 1933, and I carried on in the capacity of vice president until March, 1934, when I was elected president.

Q. Now, I assume you are familiar in general with the contract used by American Crystal Sugar Company in purchasing sugar beets for its Rocky Ford factory in Colorado. [200] A. Yes.

Q. And I assume you are familiar with the provision of it that in 1938, 1939, 1940 and 1941 provided that the price per ton of the beets shall be determined on the average sugar content of the beets delivered under this contract, and the average net return, as hereinafter defined, received for sugar sold by the factories located in the Arkansas Valley in Colorado, on the line of the Atchison, Topeka and Santa Fe

(Deposition of W. N. Wilds.)

Railroad. How long had that form of contract been used at the Rocky Ford factory?

A. Well, I can't answer that definitely, but for a number of years, I would say.

Q. Now, referring to the year 1938, in the factories for which Crystal purchased beets other than California and other than Colorado, did Crystal use a form of contract in which the growers were paid upon a method in which the payment depended in part upon the return from more than one factory?

A. Yes.

Q. And where did that occur?

A. Mason City, Iowa, in the northern part of the state, and Chaska, Minnesota, which is in the southern part of Minnesota. Those two plants drew beets partially from adjoining territories.

Mr. Works: May I clarify that? You are referring to factories operated by the same company?

The Witness: The same company, yes.

Q. In those two instances was the rate determined in part by a factory owned by any other company? A. No.

Q. And in any of the other factories operated by Crystal other than Colorado or California was the joint return method used? A. No.

Q. Now, in reference to the Colorado situation, what other beet sugar company was included as having a factory in the Arkansas Valley in Colorado on the line of the Atchison, Topeka and Santa Fe Railroad? A. The Holly Sugar Corporation.

Q. Now, I notice from the form of contract that

(Deposition of W. N. Wilds.)

was furnished me, that in 1942, in Colorado, this joint return method was no longer followed, and for 1942 the grower was paid upon the returns from Crystal alone, is that correct?

A. I would have to refresh my memory because those contracts you have there are authentic.

Q. I will show you contract furnished me for the season 1942 for Rocky Ford and for the San Luis Valley, and call your attention to paragraph 4.

A. Suppose you just read that paragraph.

Q. All right.

A. That is correct.

Q. Now, following the crop year 1942, did Crystal ever [202] again use in Colorado a method of payment in which the factory owned by any other company was used?

A. I would say, without being able to check all those contracts, no, for the reason that the government participated in setting the price for beets during the war period.

Q. Now, in Southern California, how long did the joint method of paying growers continue?

A. I can't tell you the year in which it was discontinued, but it was before the time the government commenced to participate in the payments to be made to growers for beets. You see—this may seem strange, but, with the business I have to do, I really can't remember those dates; it is impossible.

Mr. Works: I think they are pretty well documented.

Q. Did you have any conversation with anyone

(Deposition of W. N. Wilds.)

connected with Holly Sugar Corporation or Spreckels Sugar Company regarding the change in the form of contract used in the Clarksburg factory area from the 1938 method to the 1939 method?

A. Mr. Zitkowski was in charge of our agriculture——

Mr. Works: The question is, whether you talked to anybody.

The Witness: Oh, no, I don't remember talking to a soul. I wouldn't have had anything to do with it, because he is the one that figured out the details.

Q. Then, insofar as Crystal was concerned, the decision to change from the 1938 form to the 1939 form in California [203] was made by Mr. Zitkowski?

A. No. He presented the facts to me, and I was the one that made the final decision.

Q. When did he present the facts to you?

A. Just before the contract was issued; I can't remember the date.

Q. Now, the minutes of the board of directors show that on October 3rd, 1938, the 1939 contracts for Oxnard and Clarksburg were approved.

A. If that is what is shown in the minutes, that is correct.

Q. How long before that date did you have your first discussion on the subject with Mr. Zitkowski?

A. Before we presented it to the board. Here is the plan: Mr. Zitkowski and his assistants worked out the details of these proposed contracts. They brought them to me and I made certain tests for

(Deposition of W. N. Wilds.)

my own personal information to see whether or not, under the scale contract proposed and the estimated amounts that we might receive from sugar, we could make a profit. If those short individual tests showed that we could not make a profit, then he had to do some more calculating.

Q. I am particularly referring to the change from the 1938 to the 1939, in respect to the fact that the 1938 contract for Clarksburg provided the growers were to be paid [204] upon the basis of the net returns from Clarksburg alone, while the 1939 contract provided that the growers who dealt with Crystal in the Clarksburg district were to be paid upon the joint net average return of all factories north of the 36th parallel in California. Now, it is that particular change that I am inquiring about.

A. May I elaborate a little on that in giving you a reply?

Q. I want to know whether you talked about that to anyone connected with Holly or Spreckels.

A. No, no, I did not, I did not.

Q. Then, so far as you are concerned, that matter was initiated by Mr. Zitkowski, is that correct?

A. I wouldn't say it was. May I elaborate for a little bit?

Mr. Works: You have a right to explain your answer when it is called for.

The Witness: Here is the situation: I do not feel that the beet industry has any apologies to make to anyone for settling on a joint net basis, even though it may be a joint net with other companies. I say

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that for the reason that, in order to stabilize the industry, a joint net is the preferable way to settle with your growers, not only from the growers' standpoint, but from the processors' standpoint. I may turn that around, not only from the processors' standpoint, [205] but from the growers' standpoint. As an illustration, we have a plant at Clarksburg that is capable of slicing beets say, from 15,000 acres. From time to time, there are 100,000 to 150,000 acres of beets grown in that area. Now, suppose, just for the purpose of illustrating, Crystal nets \$6.00 per bag for its sugar, and Holly and Spreckels net \$5.50, the following season all of the growers would want to grow for Crystal because we netted the most. We can't take all those beets, there is only a certain quantity we can process. When we turn down these growers of Holly and Spreckels when they come to us and want us to take their contracts, they say, 'Well, to hell with beets; I am not going to grow beets any more. If my neighbor across the road gets more for his beets than I do for mine, I am not going to grow any more beets,' with the result the entire industry suffers. That can be reversed. Maybe next year Holly nets \$6.00, and Crystal and Spreckels net \$5.50. It keeps the industry in a turmoil constantly without getting any more for the growers or for the processors. Carry that thought just a little further. The mere fact that we have continued to take a joint net and settle on a joint net at Chaska and Mason City through these many years, and we still do, and that for a number of years East Grand Forks grow-

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ers were settled on a net return from the East Grand Forks plant until we finished Moorehead last year, when those two plants drew beets from much the same area, then we started to [206] settle on a joint net basis with our growers in that area.

Now, let me go a little bit further than that. It used to be, if you wished to express your opinion of inability of some individual you would say, 'Well, that man should be a farmer.' That day is past. We have some of the smartest men in the business, now, on farms, and I feel this way, that if those farmers in Minnesota and North Dakota and Iowa had felt the company was discriminating against them by settling on joint nets, they would have kicked over the traces long before this.

Mr. Arndt: I move to strike out the various comments of the witness as not responsive.

The Witness: That is merely in explanation of the question you asked.

Q. Now, referring to the change in California between the 1938 form of single average return of Clarksburg and the 1939 form of return, combined with Holly and Spreckels, at the time of your discussion with Mr. Zitkowski, when he presented that to you for the first time, and at the time you presented the matter to the board of directors, did you have before you the results of Crystal's operations, Spreckels' operations, and Holly's operations in California north of the 36th parallel during any of the preceding years?

A. I should say not. I had Crystal's.

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Q. And, then, you didn't know whether Crystal had done better or worse than the other two companies? [207]

A. During those years?

Q. During the preceding years.

A. Financially?

Q. No, insofar as the average net return was otherwise.

Mr. Works: Sugarwise.

The Witness: Netwise?

Mr. Works: Yes.

A. For what years?

Q. 1937 and 1938, or either of them, the crop years of 1937 and 1938.

A. I can't say offhand; I don't know; I don't know.

Q. Have you read Mr. Zitkowski's deposition?

A. I tried to read it, but the copy I had was so poor I could only read a portion of it. I couldn't get the full drift of his deposition.

Q. Are you aware of the fact he testified he had nothing to do with the determination of this change, and that it came from you, and that you informed him of the change, and then he told the growers and put it into effect?

A. No, I don't—repeat that again.

Q. (Last question repeated by reporter.)

A. No, I can't say that I recall telling him to put that into effect, because he was in charge of the operations and he figured up the contracts and presented them to me for approval. [208]

Q. I want to show you, call your attention, to the

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answer to Interrogatory 39, which is contained at page 139 of the answers.

A. May I say this: I was out of the state when those were prepared, as I recall it, and have never studied them.

Q. This refers to a letter.

Mr. Works: What page?

Mr. Arndt: I have 139 of the answers.

Q. This is a form of letter from Spreckels Sugar Company to Holly Sugar Corporation and American Crystal Sugar Company, dated August 16th, 1940. It says in the third, fourth and fifth lines of the first paragraph, 'we discussed with you the appointment of Messrs. Lybrand, Ross Bros., and Montgomery as accountants for the Spreckels Sugar Company.' Was that discussion with you?

A. I don't remember discussing it with them at all. I may have, but I doubt it. But that letter was written after the contract was put out; it must have been. Therefore, it had no bearing on the putting out of the contract.

Q. During the cropping years 1939, 1940 and 1941, during which the joint return method was in force in the Clarksburg area, did you make any endeavors to ascertain whether the growers received more or less under that method than they would have received under the single return method?

Mr. Works: Which growers? [209]

Mr. Arndt: Growers in the Clarksburg district having contracts with Crystal.

A. Well, I don't know how one could figure that,

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because we did not have the figures of the other two, so I don't see how we could possibly have figured them.

Mr. Works: The answer is, you don't know whether it was more or less or as much?

The Witness: How would I know unless I had the figures of the other two companies? That is right.

Q. I want to show you a letter, copy of a letter, of November 6th, 1939, from H. E. Zitkowski to Mr. Lester J. Holmes——

Mr. Works: Which page?

Mr. Arndt: That is page 52 of the answers, 52, 53 and 54.

Q. ——and particularly call your attention to the second paragraph, which commences with the words 'Concerning the first objection,' and will ask you to read that paragraph. Now, did you ever see that or a copy of that before?

A. I may have.

Q. What is your best recollection?

A. I doubt very much that I saw it at the time, because Mr. Zitkowski carried on the correspondence directly with the factory managers, who reported to him.

Q. I call your attention to this portion which refers [210] to the Clarksburg contract: 'Concerning the first objection, which refers to an average net selling price for the sugar produced in Northern California, I think you yourself understand the principles behind this very thoroughly. The prin-

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cial objective therein is to attain, as far as this is possible, a higher average net receipt for sugar by avoiding, as much as possible, cut-throat competition, crosshaul of sugar, and other similar practices, all of which tend to depress the receipts for sugar and benefit principally the transportation companies and some of the dealers in sugar to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets.' Did you ever have any discussion with Mr. Zitkowski regarding cut-throat competition or crosshaul of sugar?

A. Not that I can recall right now.

Q. Did you ever have any discussion with him as to how or in what manner the use of the 1939 form of the Clarksburg contract by Crystal in place of the 1938 form would in any way avoid cut-throat competition or crosshaul of sugar?

A. May I ask you one question so I will know what I am answering on this? Would you define cut-throat competition for me?

Q. These are Mr. Zitkowski's words, and I am asking you whether you ever discussed that subject with him. [211]

A. No, as far as I know, I never discussed that. That letter was a letter to the factory manager.

Q. Did you ever discuss the question of how the adoption of this new form of contract in 1939 in the Clarksburg area, as compared to the 1938 contract, would in any way avoid cut-throat competition or

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any kind of competition, or would avoid the cross-haul of sugar?

A. I don't know how I am going to answer those questions without giving some background.

Mr. Works: The question is, did you discuss these objections with him?

The Witness: There may have been times when I would walk into his office and he would say, 'I understand'——

Mr. Works: It isn't what you might have said. It is what you did say, if anything.

The Witness: Well, to the best of my recollection.

Mr. Works: As you recall.

The Witness: I can only answer to the best of my recollection, and that is I had none whatsoever.

Mr. Works: No man has any recollection better than his best recollection.

The Witness: That is right.

Q. Did you discuss with anyone from Holly or Spreckels in 1937, 1938 or 1939 cut-throat competition? A. No. That is absolutely no.

Q. Or did you discuss the crosshaul of sugar?

A. No. I will say I ought to explain this thing a little so this gentleman can understand it.

Mr. Works: You are doing it all right.

The Witness: But we are not getting all the real points of the thing.

Mr. Works: Mr. Wilds, we are not trying the case today.

The Witness: Oh, all right, all right.

Q. Did you ever discuss with any other officer or director or employee of Crystal in 1937, 1938 or

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1939 cut-throat competition or crosshaul of sugar or endeavoring to avoid them as far as possible, insofar as the operations of the Clarksburg factory or its product was concerned? A. No.

Q. Now, in reply to Interrogatory 99, which is found at page 205, the interrogatory asked what attempts, if any, were made by Crystal to ascertain for 1939, 1940 and 1941 cropping years the individual net returns from sugar sales by the other manufacturers of beet sugar having factories north of the 36th parallel.

A. Those are the years when they had the average net?

Q. Yes.

A. I think the sugar companies preserved their nets very carefully because they probably didn't want the others to know.

Q. The answer was, 'Crystal did not attempt to ascertain such returns except that by mathematical processes Crystal [213] worked out approximations of the said net returns.' Did you have anything to do with, or did you ever discuss or see such approximations that Crystal worked out?

A. I don't know how they would work out an approximation. No. I don't think it is possible.

Q. Then, as I understand your testimony, the first time that you had your attention in any way directed to a possible change in the Clarksburg contract from the single return to the joint return was when Mr. Zitkowski spoke to you about it?

A. That is correct.

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Q. Now, when did that conversation take place?

A. I couldn't tell you. It was at the time he was making calculations to see what we could pay to our growers in that area for their beets. As a matter of fact, our whole scale contract has always been based, not on how cheaply can we buy beets, but how much can we pay for beets and live.

Q. I am referring, now, only to the portion of the contract which changed from an average net return at Clarksburg to the joint net return of all factories north of the 36th parallel. Now, when you had that discussion with Mr. Zitkowski, who was present?

A. I don't know that anyone was present.

Q. What was said on that subject?

A. What subject? I am lost. [214]

Q. On the subject of change of the Clarksburg contract from the payment to the growers based upon the average net return of the Clarksburg factory to the average net return of all factories in California north of the 36th parallel.

A. As I recall it now, the government's participation during the war in the amounts to be paid beet growers eliminated the joint net return.

Q. The war didn't commence until 1941.

A. Yes.

Q. We are talking, now, about 1938 and 1939.

A. 1938, 1939 and 1940 we had the joint.

Q. And you had the joint for 1939, 1940 and 1941?

A. That is right.

Q. So, sometime before the 1939 contracts were printed you had this conversation with Zitkowski.

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Now, that was before the war started. What I want to know is, what was that conversation?

A. I don't remember any such conversation. Read it if you have it and maybe I will recollect it.

Q. The conversation I am calling for is the conversation that you testified that you had with Zitkowski when Zitkowski first brought to your attention the recommendation for the change of the form of the contract from the single return to the joint return. That is the conversation I want.

A. Do you want to know who was present at such meeting? [215]

Q. Yes.

A. I doubt if there was anybody except Zitkowski and myself.

Q. What was said then?

A. I don't remember. I haven't the slightest idea.

Q. What was the substance of it?

A. He must have convinced me it was proper to switch from one to the other.

Q. What is the substance of what you said and what he said?

A. I really couldn't answer that. It has been too long ago.

Q. Are you positive that prior to that conversation with him you had no conversation with anyone connected with Holly or with Spreckels on that subject?

A. That is my recollection, yes.

Q. Are you positive of that?

A. As near as I can be.

Q. To refresh your recollection, was there any

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conversation that you had with anyone connected either with Holly or Spreckels or both in which there was a discussion of the fact that Crystal's net return from Clarksburg was much higher than the net return of either Holly or Spreckels?

A. I don't think the records will bear that out year after year.

Q. I am referring to the year 1937. [216]

A. Oh, I can't answer that, because I don't remember it.

Q. Did you have any discussion with regard to the cropping year 1937?

A. Not that I remember.

Q. To refresh your recollection, did you have a discussion with anyone connected with either of those two companies in which the statement was made that unless Crystal joined in using the joint net return for Clarksburg that war would be declared, or something to that effect?

A. Listen—no; they don't bluff us.

Q. Then, you are still positive that the first suggestion of this change came from Zitkowski?

A. I would say so, because he is the individual who usually presents a proposed contract for the coming season.

Q. Now, the question of crosshaul, is that a question that the sales department would be interested in or the production department?

A. We are all interested in it. The production department has nothing to do with it. It would be the sales and management. [217]

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Q. So, any question of avoidance of crosshaul would come from the——

A. Sales or myself.

Q. Sales or yourself? A. That is right.

Q. And during the years 1938, 1939 and 1940, was it not a fact that the Western Sales Department under Mr. Hardy was under your direct supervision? A. Correct.

Q. And that you had general charge of sales?

A. Correct.

Q. So that during those years any matter of crosshaul would be primarily your problem and not Mr. Zitkowski's?

A. That is right, Mr. Zitkowski had nothing to do with it.

Q. Does that refresh your recollection, that, and this letter of Mr. Zitkowski's referring to crosshaul and reference to competition? Does not that refresh your recollection as to who initiated the question of change of the Clarksburg contract?

A. Not one particle.

Q. Is it true that Crystal had no sugar beet factories between the State of Colorado and the State of California? [218]

A. We had Montana, if you want to call that between.

Q. Other than Montana, they had not?

A. No. That is right.

Q. Now, Interrogatory No. 116, the answer to which is found at page 218—Interrogatory 116 appears at page 32 of the Interrogatories—asked

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whether Crystal ever furnished any of its employees, agents or growers with data, statements, figures or certificates or copies thereof, showing the average net returns received by Holly or Spreckels.

Mr. Works: You don't mean average, do you?

Mr. Arndt: Yes.

Q. Net return received by Holly or Spreckels, or either of them, in California north of the 36th parallel, for the years 1937 to 1943. The answer to Interrogatory No. 116 says: "Crystal did not have any systematic procedure for furnishing any of its employees, agents or growers with data, statements, figures or certificates during the crop years 1937, 1938, 1942 as to the net returns per 100 lbs. of sugar received by Holly Sugar Corporation or Spreckels Sugar Company. There were undoubtedly some discussions covering this subject between Crystal employees amongst themselves and with growers." Did you take part in or listen to any of those discussions?

A. No, none of them.

Q. The answer to 117 states: "The data referred to [219] in the preceding Interrogatory relating to the crop years 1937, 1938 and 1942 were received primarily through newspaper accounts of payments made for beets by Holly Sugar Corporation or Spreckels Sugar Company or both, and some of the information was obtained from growers growing beets for Holly Sugar Corporation or the Spreckels Sugar Company when they received their final settlement statements for the respective crop years. There was no systematic form in which these data were furnished to employees or growers except as copies of

(Deposition of W. N. Wilds.)

the final settlement statements came to their hands from growers growing beets for our competitors.”

A. Of course, we had nothing to do with that.

Q. Did you ever see any of those newspaper accounts or any of those copies of the final settlement statements or any of the other data referred to in this interrogatory?

A. I don't think that I have ever seen any of the settlement statements. I am positive I never have. Naturally, I probably have seen clippings that were sent from there to the Denver office, that were in the papers.

Mr. Arndt: May I see the first minutes we have there?

Mr. Works: The Executive Committee?

Mr. Arndt: No; of the corporation. The very first one we had.

Q. I will show you the original minutes of October 3, [220] 1938, of the directors of this corporation, and call your attention to the fact that it shows you were present, and I call your attention to the portion at the bottom of the first page which says: “The 1939 beet contracts for the Oxnard and Clarksburg, California, factories were submitted to the meeting and the several changes from the 1938 contract for the respective factory districts were explained.”

A. Yes.

Q. Who did the explaining? A. I.

Q. What did you say?

A. I usually went into a meeting—

(Deposition of W. N. Wilds.)

Q. Not usually, but what did you do at that meeting, if you remember?

A. I explained what the differences were, but I don't remember what they were, now.

Q. Did you say anything to the meeting regarding the change in the form of the 1939 Clarksburg contract, insofar as the 1939 contract provided payment upon a joint average return from all factories located north of the 36th parallel, while the 1938 contract provided for an average net return of Clarksburg only?

A. I would say, absolutely not, for the reason that I carried into those meetings a very brief memorandum, and I doubt if I would have gone into all that detail. [221]

Q. Then, have you any recollection of any reason or reasons that Mr. Zitkowski gave you for that particular change?

A. I am satisfied it was with a view of stabilizing the industry. There is nothing more important to us than that.

Q. Did he discuss the question of crosshaul of sugar?

A. I doubt that very much, because he is not interested in it. I am really surprised it came to his mind.

Q. Did he discuss with you the question of the elimination of competition among purchasers of sugar beets? A. Not at all.

Q. Did he discuss with you the elimination of

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competition among the three factories in Northern California for the growers?

A. You mean, for the contracting of growers?

Q. Yes.

A. No. There always has been competition there, but there is nothing to discuss about it. We have men to go out and work on the growers to get them to sign, or they won't sign.

Q. That subject was not discussed?

A. No, not at all.

Q. Have you any recollection of any specific reason he gave you for this change?

A. Yes, to help to stabilize the industry, both for [222] our growers and ourselves.

Q. Did he use those words?

A. I can't say that; my memory isn't that strong, but the substance of it should be that.

Q. I want to read you the portions of the deposition of Mr. Zitkowski, commencing on page 85, the seventh line from the bottom.

“Q. Now, before you had this meeting with the committee of growers, did you have any discussion with Mr. Moroney, Mr. Fisk or Mr. Holmes?

“A. Oh, I had frequent discussions with Mr. Moroney. I mean, I met him often.

“Q. I mean, with reference to this idea of determining the price to be paid on the basis of average net returns.

“A. I don't recall such other meetings with Mr. Moroney, and—say that for the reason that the matter of sales policy was not determined by me.

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“Q. Then, at the time that you attended this meeting with the growers, at which Mr. Moroney and Mr. Fisk and Mr. Holmes were present, the sales department of Crystal had already determined on this new method for 1939, isn't that correct?

“A. Well, I would say it had recommended that we follow that policy as we did in other territories.

“Q. Now, who told you this decision of the sales [223] department?

“A. Undoubtedly, the president of the company.

“Q. That is, Mr. Wilds? “A. Mr. Wilds.

“Q. Then, you were told of the decision after the decision had been made by the sales department and approved by Mr. Wilds, is that correct?

“A. I didn't put it just that way. A recommendation had been made by the sales department, or by the sales policy, which was in frequent discussion, because we had been proceeding on that sort of a method for more than 25 years, or maybe I am wrong about the 25. Since 1917 to 1938; that is 21 years, I guess; and we were doing the same thing in Colorado, and were settling on a joint factory net in our Iowa and southern Minnesota territory, so it was just an accepted condition under which we had been operating for many, many years.

“Q. So, the Iowa and southern Minnesota territory was based upon factories owned by Crystal and no one else, isn't that correct?

“A. That is correct.

“Q. Then, at the time this meeting was held with the growers, following August, 1938, the sales de-

(Deposition of W. N. Wilds.)

partment already recommended the joint return contract? "A. That is correct. [224]

"Q. And prior to that meeting, the sales department had already taken the matter up with Spreckels and Holly to see if it was satisfactory to them.

"A. Well, I don't know who talked with who, or how the approach was made.

"Q. But, in any event, the approach had been made prior to this meeting with the growers?

"A. That is correct, the recommendation had been made prior to the meeting with the growers, and it was our job to inform the growers of the intent and purposes.

"Q. And prior to this meeting with the growers, the okay had been secured from Spreckels and Holly to have this plan go into effect?

"A. Well, the okay; I don't know what you mean by okay.

"Q. I will put it in a different way. Crystal could not have put this plan into effect unless it was consented to by Holly and Spreckels, isn't that correct?

"A. I don't think Crystal initiated the proposal.

"Q. Who initiated it?

"A. I don't know.

"Q. In any event, it was initiated prior to the time of this meeting that you have testified about with the growers? "A. That is right. [225]

"Q. And regardless of who initiated it, it was recommended by the sales department of Crystal and was approved by Holly and Spreckels prior to this meeting with the growers?

(Deposition of W. N. Wilds.)

“A. It was recommended to us prior to that time.

“Q. When you say ‘to us,’ you mean to Holmes and yourself?

“A. Yes, the operating department.

“Q. So that, insofar as you know, this project originated with either Holly or Spreckels, came to the sales department, the sales department approved it and recommended it to the production department?

“A. I don’t know what the procedure was as far as Holly and Spreckels and our company are concerned.”

Now, do you know how or in what manner this proposal was first brought up for discussion between Spreckels, Holly and Crystal?

A. No, I do not know. I do know this, that our purchasing departments had nothing whatsoever to do with that feature of the beet contract. Mr. Zitkowski undoubtedly assumed that, since I eventually approved it, the purchasing people had gone over it. As a matter of fact, I think, if you ask the purchasing people today if they knew that during those years there was a net return planned for settling with growers, they will say no. The instructions of our purchasing departments—we had an eastern and western—were that [226] they get the last penny out of our share, not anybody else’s share.

Mr. Graham: You mean, purchasing department?

The Witness: Sales department, I should say. I doubt if our sales department knew anything at all about that beet contract. I would like to elaborate on

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that, but you won't let me. I did, because I had charge of the production and the sales.

Q. You did what?

A. I knew that that feature was a part of the beet contract.

Q. Now, then, after hearing this testimony of Mr. Zitkowski's, you still state that he was the one who first brought this matter to your attention?

Mr. Works: I will object to the form of the question as being argumentative and an improper attempt to cross examine one witness with reference to the testimony of another, and no proper foundation laid.

Q. Will you answer the question, please?

Mr. Works: And other objections, which will be specified at the trial. You may answer.

The Witness: Read the question, please.

Q. I will reframe the question. Is your memory in any manner refreshed by what I have read to you from Mr. Zitkowski's testimony? [227]

A. No. That was a bad answer, for the reason I should elaborate on it to clarify it, but you won't let me, so the answer is no.

Mr. Works: I won't stop you. Mr. Arndt is conducting the examination. He is the one that has the say.

The Witness: How about it?

Q. If the witness wants to make an explanation I won't stop you; I will reserve my rights to object afterwards.

A. Mr. Zitkowski has been with the company

(Deposition of W. N. Wilds.)

more than 50 years. He has had charge of the factory operations and the agricultural departments. Not only do the officers of the American Crystal Sugar Company feel that he is the outstanding factory operation and agricultural man in the United States, but other sugar companies will tell you the same thing. Now, Mr. Zitkowski has never had any experience in traffic, accounting, in sales, treasury work, or anything of that kind, never a day. I think I can say without fear of contradiction that he has never sold a bag of sugar in his life. He has had his hands full attending to his two departments, and I think these questions were unfair to ask an individual not connected with the departments and business involved.

Mr. Works: Never mind. They were asked, anyway.

The Witness: I don't want to appear to contradict Mr. Zitkowski's testimony. [228]

Mr. Works: There is no question but what you approved that setup and ultimate result?

The Witness: Certainly, I did.

Mr. Arndt: That is all.

(Signed) W. R. Wilds

Subscribed and sworn to before me at the City and County of Denver, State of Colorado, this 28th day of October, A. D. 1949.

My commission expires March 5th, 1942.

(Signed) Catharine M. Prince, Notary Public.

(Notarial Seal.) [229]

Mr. Arndt: The next deposition is that of Mr. Kraybill, Mr. W. E. Kraybill, and this is found at page 95:

“Q. What is your name, please?

“A. W. E. Kraybill.

“Q. You reside in Denver? “A. Yes, sir.

“Q. What is your connection with the American Crystal Sugar Company?

“A. Secretary and treasurer.

“Q. And how long have you held that position?

“A. Since 1934 as treasurer, and since 1936 as secretary.

“Q. I have shown you items A to H, both inclusive, of item 8 of the subpoena here. Now, did you ever have any conversations with anyone connected with Holly Sugar Corporation or Spreckels Sugar Company regarding any of those matters during the years 1937 to 1943, inclusive?

“A. No, sir.

“Q. Did you ever see or have any correspondence with anyone connected with Holly or Spreckels, other than the question of the appointment or designation of the certified public accountant?

“A. No.

“Q. Did you ever have any discussion with anyone connected with Crystal, either as an officer, employee, or director, [230] during the years 1937 to 1943, regarding any of those matters, other than the selection of the certified public accountant to which I have referred?

“A. What do you mean by discussion?

(Deposition of W. E. Kraybill.)

“Q. Conversation or discussion.

“A. Well, I prepared the contracts according to the instructions.

“Q. Contracts with whom?

“A. Well, beet contracts.

“Q. Did you ever have anything to do with the preparation of the 1939 California Clarksburg contracts?

“A. Prepare the form for the printer.

“Q. From whom did you receive your instructions?

“A. I received them usually from Mr. Zitkowski. I can't tell definitely just who I received instructions from for the preparation of those.

“Q. Did you have any discussion with either Mr. Zitkowski or Mr. Wilds as to the reason for the change in the 1939 form from the 1938 form?

“A. No, because that wasn't any of my business.

“Q. Then, the only discussion you had was in connection with the printing of either the form or proposed forms of contract, without going at all into the reasons for any of those contracts, is that correct? “A. That is right.” [231]

That ends Mr. Kraybill.

The next is Mr. J. A. Summerton, found at page 98:

“Q. What is your name, please?

“A. J. A. Summerton.

“Q. You reside in Denver? “A. Yes, sir.

(Deposition of J. A. Summerton.)

“Q. What is and has been your connection with American Crystal Sugar Company?

“A. Well, from the time I started?

“Q. Oh, go back to 1935 or six.

“A. Well, for the period 1930 until January, 1936, I was cashier at the Oxnard factory, and from January, 1936, to some time the latter part of 1946, I was purchasing agent.

“Q. You mean at Oxnard or the home office?

“A. In Denver. And from 1946 until March 1st of this year I was comptroller, and vice president and comptroller since that time.

“Q. Have you seen the subpoena herein?

“A. I have.

“Q. Now, referring to paragraph 8 thereof, and to items A to H, just read them over. Did you ever have any discussion with anyone connected with Holly or Spreckels, or were you present at any discussion at which any of such persons were present, at which any of those items were discussed?

“A. No. [232]

“Q. Did you at any time between 1937 and 1943 discuss any of those matters with anyone connected with Crystal, or were you present at a meeting at which any of those matters were discussed?

“A. No.

“Q. Did you ever see or take part in any correspondence or see any communications regarding any of those matters during those years?

“A. Not during those years.”

Then Mr. Hayden starts at page 100:

(Deposition of J. B. Hayden.)

“Q. What is your name, please?

“A. J. B. Hayden, H-a-y-d-e-n.

“Q. You live in Denver, do you?

“A. That is right.

“Q. And what is your connection with Crystal?

“A. Executive vice president.

“Q. How long have you held that position?

“A. Since March 1st, 1949.

“Q. And prior to that what was your connection with Crystal?

“A. I was vice president and general manager from 1946 to 1949.

“Q. And prior to 1946?

“A. I was eastern salesmanager from 1936 until 1946.

“Q. Now, were you served with a subpoena in this case? [233]

“A. Yes, I was.

“Q. Now, I show you a copy of the subpoena, and particularly call your attention to items A to H of paragraph 8, and ask you to read them over. Did you at any time in 1937 up to 1943, inclusive, have any conversation with, or were you present at, any conversation at which there was present any representative officer or employee of the Holly Sugar Corporation or Spreckels Sugar Company, at which any of the matters referred to in items A to H of paragraph 8 of Exhibit A to the deposition was or were discussed?

“A. No, sir.

“Q. Did you ever have any discussion with or were you ever present at any discussion with any officer or employee of the American Crystal Sugar

(Deposition of J. B. Hayden.)

Company regarding any of those matters during those years?

“A. I didn’t know that we had a joint net settlement during those years. I was eastern salesmanager and was not advised of it.”

That completes the depositions except as to certain matters that appeared in the deposition which were not the subject of a particular witness’s testimony, which I will next offer.

At page 64 of the same deposition there was read into the record an extract from the minutes of the executive committee—pardon me—from the minutes of the board of [234] directors of the defendant American Crystal Sugar Company as follows, and I now offer that into evidence:

“The 1939 beet contracts for the Oxnard and Clarksburg, California, factories were submitted to the meeting and the several changes from the 1938 contracts for the respective factory districts were explained. After discussion, and upon motion duly made and seconded, it was unanimously resolved the forms of the 1939 beet contracts as submitted for the Oxnard and Clarksburg, California, factories be approved.”

Now, there are certain other matters that are set forth in the books of account which were read into the minutes, which I think could be handled more simply by including them in the stipulation that we will present, so instead of reading them now—they are just figures taken from the books, so instead of

reading them now I will put them in the stipulation that we are going to file.

Does the court desire to take a recess at this time?

The Court: I am going to ask a question so it will be clear in the record. As I understand there is no claim that beets involved in this hearing, in their original form, ever crossed a state line.

Mr. Arndt: That is correct.

The Court: It is only the products of the beets that [235] entered into interstate commerce.

Mr. Arndt: That is correct.

The Court: To-wit, sugar.

Mr. Arndt: That is correct.

Mr. Works: So stipulated.

Mr. Arndt: And that was the situation that arose previously and that was the reason we took the word "sugar" out before because your Honor wanted to be sure we weren't claiming that the beets crossed the state line.

The Court: And I still want that.

Mr. Arndt: And that is still our position.

The stipulation will show, your Honor, that certain molasses that was produced from cane in the Hawaiian Islands, was shipped into the Oxnard plant and was used in the Oxnard plant together with beet pulp that came as a byproduct of the manufacture into sugar of both Clarksburg and Oxnard beets at the Oxnard plant, and the resultant molasses, beet pulp was sold.

That is the only additional item that has developed as to that. In other words, we have an interstate shipment of molasses involved also.

Mr. Works: That doesn't affect the situation with reference to beets.

Mr. Arndt: That doesn't affect the situation with reference to beets. No beets crossed the state line.

The Court: We will take a five-minute recess at this time.

(Short recess.)

The Court: Proceed, gentlemen.

Mr. Arndt: At this time, if the court please, we desire to offer certain exhibits—pardon me, certain documentary evidence into evidence as exhibits.

The first 23 of those listed in our list of exhibits are documents that are attached either to the amendment to the answer or to the amended complaint.

The Court: Just how are we going to keep that straight?

Mr. Arndt: By having them offered by reference. In other words I have them on this list of exhibits. Each one is referred to as to just what it is. They are all printed documents.

Mr. Works: May I peek over your shoulder at your list?

Mr. Arndt: Yes.

Mr. Works: The first 13 seem to be contract forms with other companies to which we object as being immaterial.

Mr. Arndt: Inasmuch as they are attached to the answer I don't see how they can very well claim they are immaterial.

Mr. Works: Our answer?

Mr. Arndt: These are taken from your own answer.

Mr. Works: The objection is certainly withdrawn.

Mr. Arndt: The first 23 documents are taken from your [237] answer.

Mr. Works. I don't recall now how that happened but if we attached them I am disqualified.

Mr. Arndt: It may not be necessary even to offer them if they are a part of their answer but I do offer them.

Mr. Works: I don't care. It doesn't make any difference.

The Court: The only thing is, gentlemen, when we get all through somebody is going to be unhappy and then what is going to be sent to the Circuit Court. That is what I want to know.

Mr. Arndt. Well, I am offering them by reference if the court please.

The Court: You are offering them by reference. What does that mean to me? When I have to read them how am I going to know what you are talking about when you brief this case and when the Circuit Court doesn't know anything about the background until it gets the record.

Shouldn't those be offered in evidence and in some manner designated in the record as to what they are so when the record goes to the Circuit Court that court will know what you are talking about.

Mr. Arndt: For example I would offer as our Exhibit 1 by reference the Los Alamitos Sugar Company and Holly Sugar Corporation the 1938-1939 agreement for Imperial, which is Exhibit 1 of the

amendment to the answer to the first amended [238] complaint. That describes it.

Mr. Works: May I make one suggestion along the line of what his Honor is thinking about. If there is an appeal in this case there is going to be a printed record. You also have the right to take up original exhibits. Now, why don't we either tear these out of the answer or else put in duplicates so they can remain as exhibits and they won't have to be printed, because that is going to cost somebody a lot of money.

The Court: As I understand the first 23 of these items are a part of the answer or the pleadings.

Mr. Arndt: Yes, they are.

The Court: Of the defendant.

Mr. Works: They would be in the judgment roll ordinarily.

The Court: If you stipulate they be deemed in evidence they will not have to be duplicated.

Mr. Works: All right.

Mr. Arndt: Then I will read the exhibit numbers as they appear in the documents themselves.

Mr. Works: Why don't you hand them to the clerk and let him copy them?

Mr. Arndt: All right, and they will be considered as read.

The Court: Are they all on that one document?

Mr. Arndt: Yes, the first 23 items of that document. [239]

The Court: I mean the rest of the items that you are going to offer.

Mr. Arndt: This contains all items up to item 55. Then I have another document that starts at 55 and

goes on. In other words, items 24 to 55 are documents which I will now offer.

The Court: That you are going to present?

Mr. Arndt: Yes.

The Court: Actually physically present them?

Mr. Arndt: Yes.

The Court: Then read into the record the first 23 which will be deemed as offered and which are now a part of the pleadings and so designated.

Mr. Arndt: The first is Los Alamitos Sugar Company and Holly Sugar Corporation, 1938-1939 agreement, Imperial Valley, which is Exhibit 1 of the amendment to the answer to the first amended complaint.

No. 2 is the Holly Sugar Corporation, Santa Ana, 1939 agreement, which is Exhibit 2 to the same.

No. 3 is Holly Sugar Corporation, Santa Ana, 1940 agreement, which is Exhibit 3 to the same.

No. 4 is Los Alamitos Sugar Company and Holly Sugar Corporation, 1940 local contract, which is Exhibit 4 to the same.

No. 5 is the same for Imperial Valley, 1940-1941 to the [240] same.

No. 6 is the Holly Sugar Corporation, Santa Ana, 1941 agreement, which is Exhibit 5 also to the same.

No. 7 is Los Alamitos and Holly local 1941, which is Exhibit 7 to the same.

No. 8 is Los Alamitos, Long Beach, 1941, which is Exhibit 8 to the same.

No. 9 is Union Sugar, Coastal, 1939, which is Exhibit 9 to the same.

No. 10 Union Sugar, San Joaquin Valley, 1939, which is Exhibit 10 to the same.

11 is Union Sugar, Coastal, for 1940, which is Exhibit 11 to the same.

No. 12 is Union Sugar, marked "Probably San Joaquin Valley," 1940, which is Exhibit 12 to the same.

No. 13 is Union Sugar, Southern, 1941, which is Exhibit 13 to the same.

No. 14, American Crystal Sugar, Coastal, for 1939, which is Exhibit 14, to the same.

No. 15 is American Crystal, San Joaquin Valley, 1939, which is Exhibit 15 to the same.

No. 16 is American Crystal, Coastal, 1940, which is Exhibit 16 to the same.

17, American Crystal, San Joaquin Valley, 1940, which is Exhibit 17 to the same. [241]

No. 18, American Crystal, Coastal, which is Exhibit 18 to the same.

No. 19, American Crystal, San Joaquin Valley, 1941, which is Exhibit 19 to the same.

No. 20, American Crystal, 1938 Clarksburg is Exhibit A to the amended complaint but that is 1938 Clarksburg.

No. 21 is American Crystal, 1939 Clarksburg, which is Exhibit 13 to the amended complaint.

No. 22 is American Crystal, 1940 Clarksburg, which is Exhibit C to the amended complaint.

No. 23 is American Crystal, 1941 Clarksburg, which is Exhibit D to the amended complaint.

The Court: You are building up a big record in view of the fact the documents are all admitted and

recognized by the parties. You are going to need a sugar factory of your own to pay for it.

Mr. Works: Apparently Mr. Arndt wants these things. I don't see where they help or hinder in any way, but he is making his own record.

The Court: It looks like he is the engineer.

The Clerk: Shall I find each one of those documents and put a mark on them?

The Court: They are just deemed in evidence, that is all.

Mr. Arndt: These next documents have all been exhibited to counsel. [242]

First we offer Exhibit 24.

The Court: No exhibits have actually been offered yet. It is only by reference.

Mr. Arndt: Yes.

The Court: Then the next exhibit you offer will be Exhibit 1. You haven't introduced any exhibit in evidence yet.

Mr. Arndt: The others I have numbered from 1 to 23 and I have these numbered from 24 on.

The Court: All right, let us follow the numbers, Mr. Clerk.

Mr. Arndt: As No. 24 we offer the American Crystal Oxnard contract for 1935.

The Clerk: Plaintiff's Exhibit 24.

Mr. Arndt: As No. 25 we offer the Amalgamated Sugar, Holland District, 1934-1935 contract.

The Clerk: Plaintiff's Exhibit 25 in evidence.

Mr. Arndt: As No. 26 the American Crystal, Oxnard-Yellow, 1936 contract.

The Clerk: Plaintiff's Exhibit 26 in evidence.

Mr. Arndt: As No. 27 American Crystal, Oxnard-White contract for 1936.

The Clerk: Plaintiff's Exhibit 27 in evidence.

Mr. Arndt: As No. 28 American Crystal, Delivery at Tracy or Alvarado, 1936 contract. [243]

The Court: What materiality do these old contracts have, Mr. Arndt?

Mr. Arndt: I want to present a complete picture of the situation.

The Court: The period you are complaining about is 1940 and 1941.

Mr. Arndt: That is right and I am showing what transpired before and what transpired afterward. I am presenting all the contracts.

The Court: There isn't any dispute about them, is there, counsel?

Mr. Works: Not that I know of, your Honor.

The Court. That prior to these three years they paid off at the individual plant and afterwards it was the average during these three years. It was the average and that was the change.

Mr. Works: That is right. No dispute about that at all.

Mr. Arndt: I would like to offer all the contracts before and after.

The Court: Why don't you offer them as one exhibit?

Mr. Arndt: Very well. I offer as Exhibit 28 the Amalgamated Sugar Company, Clarksburg, 1935-1936 contract.

As No. 30 I offer the American Crystal, Oxnard, White, 1937 contract. I offer American Crystal, Oxnard, Yellow, 1937 contract. [244]

I offer American Crystal, Clarksburg, 1937 contract.

I offer American Crystal, Oxnard, White, 1938 contract.

I offer American Crystal, Oxnard, Yellow, 1938 contract.

I offer American Crystal, Oxnard, 1942, two contracts.

That will all be one exhibit, Exhibit 29.

The Court: Admitted.

Mr. Arndt: That consists of what was on the list of exhibits as Exhibits 29 to 35, inclusive.

I offer as our next exhibit the contracts of the National Sugar Manufacturing Company for 1938, 1939, 1940, 1941 and 1942, consisting of five contracts.

The Court: Admitted.

Mr. Arndt: That was our old 36 and it will now be offered as Exhibit 30.

The Court: Admitted.

Mr. Arndt: As Plaintiff's next exhibit we offer the American Crystal, Clarksburg contract, for 1943, 1944, 1945, 1946 and 1947, consisting of five contracts.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 31.

Mr. Arndt: That was our old 37. We now offer it as 31.

The Court: It is admitted.

Mr. Arndt: Now as our next exhibit, Exhibit 32, we offer the American Crystal, 1939, 1938, 1940, 1941, and 1942, [245] for Missoula, Rocky Ford, San Luis Valley, Albuquerque and Texas Panhandle, Grand Island, Mason City, Chaska, East Grand Forks, for

North Dakota, East Grand Forks for Minnesota. Those are our old numbers 38, 39, 40, 41 and 42. I offer those in evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 32.

Mr. Arndt: We next offer a letter from American Crystal Sugar Company by Mr. Lester Holmes to R. C. Zuckerman, dated July 20, 1943, which is our old Exhibit 43, referring to an extra 50 center per ton for beets delivered prior to December 1st, 1943.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 33 in evidence.

Mr. Arndt: As our next exhibit, Exhibit 34, we offer the old 44, copy of a letter from Mandeville Island Farms, Inc., by Roscoe C. Zuckerman, to Mr. Lester Holmes, manager of Crystal Sugar Company, Clarksburg, California, dated November 18, 1940, with reference to certain field tests as to the results of the early harvest of sugar beets.

The Clerk: That is Exhibit 34.

The Court: What is the materiality of that? I don't like to get you started again.

Mr. Arndt: Under the contract, as the Supreme Court pointed out, the company could direct when beets were to be harvested. During this period of years they would tell the grower when to deliver and when not to deliver, and so on. They were insisting in certain years on early delivery. We will show that the grower objected, and this is the result. Here the grower makes tests and advises the company, when he has to deliver early, he has less weight and less sugar content than if he were allowed to hold the beets—

The Court: I know, but the agreement before the three years in question had the same provision.

Mr. Arndt: That is correct.

The Court: In other words, there would be nothing illegal in this contract if it was not the result of a conspiracy. In other words, the American Crystal Sugar Company could make with the grower any kind of a contract he wanted [247] to, as long as it was not the result of a conspiracy.

Mr. Arndt: I wouldn't go quite that far, in view of a decision of the Circuit Court in one of the eastern circuits in connection with a somewhat similar contract. They said it was unconscionable, the various terms and conditions that were put in there.

The Court: I know, but as far as an antitrust case is concerned——

Mr. Arndt: That is correct, your Honor.

The Court: As far as an antitrust case is concerned, it has to be as the result of a combination.

Mr. Arndt: That is correct. This also goes again to the situation of showing the unfairness of using the Clarksburg 1939, 1940, and 1941 individual return as a basis for damages where, in some of the years when the beets were shipped to Oxnard, and some of the years the grower was forced to harvest beets early, over his own desire, so the company could ship them to Oxnard, this shows the result of early shipping when the company insisted on having them shipped early.

The Court: I know, but what you are complaining about in this case, as I understand it, is the aver-

age return upon which the different refineries agreed.

Mr. Arndt: That is right.

The Court: These other matters have nothing to do with [248] the antitrust suit.

Mr. Arndt: Except as they go to show that it is improper to use Mr. Works' theory of the 1939, 1940, and 1941 individual Clarksburg returns.

Mr. Works: Your Honor, in order to cut the Gordian knot, I will object to this exhibit as entirely immaterial.

The Court: I think it is immaterial, but if he has anything upon which he thinks he can tie into that, why, let him go ahead.

Mr. Arndt: As our next exhibit, we will offer a group of photostatic copies of the books and records of Crystal, taken from the Analysis Ledger of Control Accounts, being the dried pulp sales for the fiscal year ending March 31, 1942, the wet pulp account, the molasses sales account, for the year ending March 31, 1942, the same information for the year ending March 31, 1941, the same for the year ending March 31, 1943, being items 45 to 53 of our former list of documents. We offer them as one document now.

The Court: I am going to admit these exhibits. I am under the impression, Mr. Arndt, you are going to have a heavy burden to show where they are material to any issue in the case. I know you are quite convincing and quite an advocate when it comes to writing, but you are going to have a lot of trouble in that respect, because I don't see where the pulp sales have anything to do with it. You may be able to [249] show me. I am just calling your attention to that at

this time. You might be able to convince me about it as you did in the Santa Anita race track and the railway, but you are going to have a new problem now.

The Clerk: That will be Exhibit 35.

Mr. Arndt: As our next exhibit, we offer certain data furnished by Crystal to us, showing the number of bags sold in the crop years 1940 and 1941 from Clarksburg, and the crop years 1939, 1940, and 1941 from Oxnard, showing the gross receipts and sales and marketing expense that were included in determining the joint net return. This is contained in item 54 of our previous document.

The Clerk: That is Exhibit 36.

Mr. Arndt: As our next exhibit, we offer photostatic copies of the office records of Wood, Crump, Rogers, Arndt & Evans, showing the daily time record and the amount of time spent on these two cases from day to day and from month to month and from year to year in connection with the application for attorney fees.

The Court: Is that also from decade to decade?

Mr. Arndt: Yes, your Honor.

The Clerk: That will be Exhibit 37.

Mr. Arndt: For the purpose of aiding the Clerk in following the next exhibit, I hand him a copy of the document headed "Plaintiffs' Additional Exhibits." What will be the [250]next number?

The Clerk: Exhibit 38.

Mr. Arndt: As Exhibit 38, I offer a lease dated July 31, 1940, and one dated December 31, 1941, between American Crystal Sugar Company and G. K.

Evans. These are items 57 and 58 of the other document.

The Court: Did you say "leases"?

Mr. Arndt: The leases covering the property Mr. Evans farmed.

The Court: Do I understand the American Crystal Sugar Company own the land Mr. Evans worked?

Mr. Arndt: Yes, your Honor.

The Court: Is that also true of Mandeville?

Mr. Arndt: No, your Honor. In connection with Mandeville that land was originally owned outright——

The Court: In other words, as far as the record is concerned, so far as the Mandeville case is concerned, the American Crystal had no control over the land whatsoever.

Mr. Arndt: We say save such as might be set forth in the contract for sugar. It had no interest in the land itself, save and except crop mortgages it received.

The Court: Well, that is incidental.

Mr. Arndt: Yes. Well, it might be incidental to the title, but it was not incidental to the fact that Mandeville and Zuckerman couldn't—— [251]

The Court: I know. The Sugar Company may have financed them, but that has nothing to do with this lawsuit.

Mr. Arndt: Well, it does if the defense of *pari delicto* is seriously urged. It has in this respect, that in 1938, the crop year, before there was any conspiracy, Mandeville Island gave a crop chattel mortgage to the Sugar Company. They were flooded out that

year, and from then on they were indebted under crop mortgages. This original crop mortgage applied to all future crops until they were paid off. So they were not a free agent and, without paying off Crystal this back crop mortgage, they couldn't deal with anybody else, because they had a crop mortgage on and a chattel mortgage, too. For that purpose, we weren't free. That is the only purpose those crop chattel mortgages cover in the case.

But insofar as Crystal is concerned, and Evans, these leases show that Evans was to pay 20 per cent of the amount of any and all conditional payments received under the Sugar Beet Act of 1937, and that would apply to the year here involved.

The Court: There were no payments under that Sugar Act, though, were there?

Mr. Arndt: Yes, your Honor, payments were made, which we will show by our next exhibit. In other words, payments were made and payments were turned over to Crystal.

The Court: I know, but that is on the accounting angle.

Mr. Arndt: No, your Honor. The Secretary of Agriculture [252] in the determination determined that any persons receiving benefits should not use a joint return. Crystal did receive it, had a contract to receive, and we will show Crystal did receive 20 per cent——

The Court: But you haven't answered my question.

Mr. Arndt: What is it?

The Court: That feature of it is a matter of ac-

counting, isn't it, rather than part of the conspiracy?

Mr. Arndt: Well, in this sense——

The Court: In other words, counsel, if you can establish damages here, and suppose there is also shown there is money under an accounting, I am not going to use that as a measuring stick for damages.

Mr. Arndt: We do not claim we are entitled to this, we ourselves are entitled under an accounting to this 20 per cent of the payment. That we do not contend. We merely contend this is one element in connection with a possible theory as to using the figures of the Secretary of Agriculture, and, second, that they continued during the third year, that is 1941, to operate under this plan, after the Secretary of Agriculture had said that it shall not be used to anyone getting the benefit payments, and they were receiving portions of the benefit payments despite that.

The Court: When you add all that up, what does it mean?

Mr. Arndt: It means two things. It means an additional [253] possible theory of damages, and it simply means a continuation of this plan after they received formal, official knowledge that it was objected to by the Department of Agriculture, the use of a joint net return with any other company.

We next offer, if the Court please, as our next exhibit, document listed as 65 in this record, Holly Sugar Corporation News Letter of November 13, 1941.

The purpose of this is to show that, as soon as the conspiracy ended, the various companies were offer-

ing bonuses to growers. The Crystal interrogatories show that they offered 50 cents a ton plus an early delivery bonus of \$1.70 and 35 cents. This is to show what Holly Sugar Corporation offered.

The Court: All right. Now, counsel, after the termination of conspiracy, the act of another member of the conspiracy is not admissible.

Mr. Arndt: We endeavor to show by this the resumption or the commencement of competition.

The Court: I know, but what somebody else did is not binding upon the American Crystal Company after the conspiracy terminated.

Mr. Works: We would object on that ground, your Honor.

The Court: I will sustain the objection.

Mr. Arndt: This was sent out while the conspiracy was still operating as to the next contract in this sense. This is dated November 13, 1941. The 1941 contracts settlement [254] did not take place until August 1942. So, on November 13, 1941, which was the date of this document, when they were seeking to sign up these growers for the 1942 contract, the growers were making deliveries yet under the 1941 contract, and the time for settlement had not as yet been reached. So that the growers and the companies were still operating under the 1941 contract at that time.

The Court: They might have still been operating under it, but they——

Mr. Arndt: They apparently decided in the future they were not operating under it.

The Court: Well, I am going to admit it, counsel. These people had, you might say, one outlet for their

beets, the American Crystal, and the question is, could they have gotten more for their beets during that period than they did get? I don't think that tends to prove or disprove anything, what some other company is going to do, but I will admit it to facilitate the movement along here. I want to see some live witnesses. That is what I am looking for.

Mr. Arndt: I have two of them here, your Honor.

The Court: Well, I am looking for them.

Mr. Arndt: That is No. 65.

The Clerk: That will be exhibit 39.

Mr. Arndt: Our next exhibit is an original agreement between American Crystal and Evans, dated August 31, 1942, [255] when their relationship ceased, and which provides that the portion of the sugar benefit payments under the Sugar Act of 1937, which had been withheld by the Government, should be paid to Crystal when and as received. That is the old 67.

The Clerk: That is Exhibit 40.

Mr. Arndt: The next is the old 68 and old 69, which are the sugar beet deliveries to American Crystal Company during August 1st to August 21st of the year 1939, and August 1st to August 21st of the year 1940.

The Court: By whom?

Mr. Arndt: By Mandeville Island Farms, Inc., in each of those years.

The Court: There isn't any dispute as to the amount of deliveries, is there?

Mr. Arndt: No. The purpose of it is this, your Honor. I will put it this way. One of our theories of

damages is that we should apply the 1942 basis of payment.

The Court: Does that cover 1942?

Mr. Arndt: No. I will explain it.

The Court: What year do those cover? Is that a part of the period of conspiracy?

Mr. Arndt: Yes, your Honor.

The Court: Isn't that admitted in the answer?

Mr. Arndt: No.

The Court: The amount of beets received? [256]

Mr. Arndt: No. I will explain this, your Honor. Under the 1942 contract, there was an early bonus payment. In order to apply that same payment to 1939 and 1940, if the court so determines it, we must know what those exact weekly deliveries were. This shows the exact weekly deliveries. Unfortunately, Crystal could not find their copies of these records, so the only thing we can do is to furnish our original records, which we got from Crystal during those particular times, showing deliveries during those three weeks, so if your Honor should agree with us, we would have the definite calculations here in the record.

The Court: Well, I might state now—and I have found it sometimes gets you in trouble to think out loud, because sometimes I have to back up, take water—I have this thought in mind, that it is hardly fair to compare conditions existing in 1942 with the years prior thereto, because of the war situation. I think that changed the whole economic picture. We know what effect that had upon economic life and the price structure.

Mr. Arndt: The price structure was frozen.

The Court: What is that?

Mr. Arndt: In most cases, the price structure was frozen.

The Court: I realize it was frozen. I don't remember the date that it was frozen.

Mr. Arndt: I will supply that information in our brief, [257] if the Court please, as to when that was.

The Court: I have that thought in mind when you are trying to compare things. For instance, there is the demand. Here you have a high demand, a great demand for a commodity. That demand would very easily exist in 1942 and it wouldn't exist in 1939.

Mr. Works: Your Honor, I can think of just one thing alone. There was no more cane sugar from either Hawaii or the Philippine Islands, and we will show beet consumption in California almost doubled in 1942.

The Court: I am making comments as we go along so, as you gentlemen try to work out your briefs, you will know some of these problems. I know it would be better if I would play poker here and keep quiet.

The Clerk: The last document is Exhibit 41.

Mr. Arndt: As the next exhibit, we offer the document listed as No. 82, transcript of proceedings on hearing on defendant's motion to quash the deposition subpoena at Denver, Colorado, on September 16, 1949, before the District Court of the United States for the District of Colorado, in connection with the fixing of attorney fees, because this was one court proceeding that did not take place before your Honor, and the only way your Honor can know what

there happened is to show the proceeding itself. So we offer this for that purpose.

Mr. Works: Isn't the time for this in your schedule? [258]

Mr. Arndt: No. I was not there. This is not shown in our schedule at all.

Mr. Works: I was not there either. This was at Denver, Colorado.

The Court: You introduce it for that purpose only?

Mr. Arndt: Yes. That is the only purpose for which I am offering it, your Honor.

The Clerk: That is Exhibit 42.

The Court: I might state that on the question of attorney fees, I am going to ask for an expression from counsel on that feature of it before the evidence is closed. In other words, I am not going to try to grab a figure from the thin air as to attorney fees that are going to be allowed. The last case I tried, I had an attorney all warmed up, thinking he was going to get a large attorney fee, and then I decided the case against him. He wouldn't speak to me for several weeks. Then he said the statute of limitations had run.

I make that explanation because I don't want you to think, from the fact that I am asking for evidence and data on the question of attorney fees, that anything is indicated. I want the information before me if I do need it.

Mr. Arndt: We next offer a document marked 85 in this list of documents, which is a Haskins & Sells

statement for Crystal's Clarksburg factory for the year 1942.

The Court: What is that? [259]

Mr. Arndt: Clarksburg, 1942. It is a Haskins & Sells Clarksburg statement for 1942.

The Court: I still don't get the first word that you use.

Mr. Arndt: It is a copy. That is our old 85.

The Clerk: That will be Exhibit 43.

Mr. Arndt: Our final one at this time is the various copies of the various crop mortgages, chattel mortgages, from Mandeville and Zuckerman to Crystal, and the final release of March 3, 1944. This is not listed on that group, but it is marked here as 86.

The Court: And they are offered for the purpose of showing the relationship between the parties?

Mr. Arndt: To show the relationship between the parties, yes, that is it.

The Clerk: That is Exhibit 44.

Mr. Arndt: I will next follow with living witnesses, if the Court please.

The Court: We will take a recess at this time until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 p.m. of the same day.) [260]

Los Angeles, California, February 23, 1950
2:00 o'clock p.m.

The Court: Proceed, gentlemen.

Mr. Arndt: If the court please, we have an additional written stipulation as to some facts which we would like to offer in evidence in the same manner as

offered previously, that is, to have the reporter copy it into the record.

The Court: Stipulation of facts?

Mr. Works: Yes, your Honor.

The Court: That will be the order.

Mr. Arndt: We offer it in evidence as we did before.

Mr. Works: We are still going on the assumption your Honor made some time ago, that there is no jury present. We think a lot of these things are immaterial but they don't do any harm and they may go in so far as we are concerned.

(The stipulation referred to is, in words and figures as follows: [261])

It is hereby stipulated as follows:

1. During the crop year 1942, Crystal paid to growers in California who signed its Clarksburg form of contract, the following amounts, in addition to the prices set forth in said contracts between Crystal and the respective growers:

(a) A "bonus" of 50c per ton for beets delivered;

(b) An "early delivery bonus" of \$1.00 per ton for beets delivered the week commencing July 27, 1942, 70c per ton for beets delivered the week commencing August 3, 1942, and 35c per ton for beets delivered the week commencing Aug. 10th, 1942.

(c) Neither of said bonuses was paid during the crop years 1939, 1940 or 1941.

2. (A.) During the 1939, 1940 and 1941 crop years, no beets were delivered to Crystal prior to August 1st.

B. During the 1939 crop year delivery of sugar beets was made by Mandeville to Crystal as follows:

(a) During the week commencing July 27th—none;

(b) During the week commencing August 3rd—none;

(c) During the week commencing August 10th—57.253 tons;

3. During the crop year 1940, deliveries of sugar beets were made by Mandeville to Crystal as follows:

(a) During the week commencing July 27th—72.682 tons; [262]

(b) During the week commencing August 3rd—1103.295 tons;

(c) During the week commencing August 10th—1746.692 tons.

4. During the 1941 crop year, no deliveries of sugar beets were made during the first three weeks of August by either Zuckerman or Evans.

5. Crystal acquired its Clarksburg plant after its predecessors, Amalgamated Sugar Company, had signed growers on its 1936 crop contract. Crystal completed performance upon these contracts. The first crop year as to which Crystal signed growers to its Clarksburg contract was 1937. The net return from Crystal's sales of sugar from the Clarksburg plant during the cropping years 1937 and 1938, as defined in the 1937 and 1938 contracts, and averaged for the 2 years, was 3.504c per pound.

6. The 1942 Clarksburg average net return of Crystal from sales of sugar, as defined in the 1942 contract, was 4.246c per pound.

7. The 1943 crop payments to growers by Crystal in the Clarksburg district was not based upon a net return basis but upon a price composed of a base payment, a support payment established by the Commodity Credit Corporation, an early delivery incentive payment [263] of 25c per ton and an incentive payment of \$1.00 per ton.

8. If the various bonuses paid during the crop year 1942 had been paid during the crop years 1939, 1940 and 1941, the resulting additional payments would have been as follows:

If the early delivery bonus of \$1.00 was paid for the week commencing July 27th, the 70c bonus for the week commencing Aug. 3rd and the 35c bonus for the week commencing August 10th, the resulting additional payments would have been as follows:

		Zuckerman		Evans
	1939	1940	1941	1941
50c bonus	11,177.8	12,715.15	7,072.35	2,200.85
\$1.00 first wk. bonus.....	none	72.68	none	none
.70c second wk. bonus.....	none	772.31	none	none
.35c third wk. bonus.....	20.04	611.34	none	none

9. If Mandeville, Zuckerman and Evans had been paid for their beets in 1939, 1940 and 1941 on the same basis as a grower would have been paid for the same amount of beets with the same sugar content, delivered in the same week, but calculated under the 1942 Crystal-Clarksburg contract, the additional payments over what was actually paid would have been as follows, if the early bonuses were paid for the weeks commencing [264] July 27th, August 3rd and August 10th, respectively:

	Contract Additional	50c Bonus	Early Del. Bonus	Total
1939 Mandeville	54,261.50	11,177.80	20.04	65,459.34
1940 Mandeville	48,459.24	12,715.15	1456.33	62,630.72
1941 Zuckerman	8,800.42	7,072.35	0	15,872.77
1941 Evans	3,192.25	2,200.85	0	5,393.10

(No No. 10.)

11. Evans delivered beets to Crystal's Clarksburg factory in 1937 and 1938. Mandeville delivered no beets to Crystal in 1937. Mandeville was under contract to deliver beets to Crystal for the cropping year 1938. The properties were planted with seed purchased from Crystal by Mandeville under the standard Clarksburg 1938 contract but the entire crop was destroyed by a flood which in February, 1938 covered Mandeville Island and as a result no beets were produced that cropping year.

12. Evans was indebted under crop and chattel mortgages to Crystal at the time he signed the 1939 contract and continued consistently indebted to Crystal thereafter until August 31, 1942, when he was indebted in the sum of \$45,952.38, which was secured by crop and chattel mortgages. At that time the parties entered into an agreement dated August 31, [265] 1942, the original of which will be offered in evidence.

13. Evans entered into leases with Crystal dated July 31, 1940 and December 31, 1941 for the farming of certain land owned by Crystal and farmed by Evans. Said land was owned by Crystal. Said leases provided for the use of said land for the growing of sugar beets. Said leases provided for rent of 20% of the price received for the beets and 20% of all payments under the Sugar Act of 1937 or any laws in

continuation or amendment thereof and 20% of any soil conservation or other benefit payments.

14. For the 1939 crop, 20% of the payments under the Sugar Act of 1937 on sugar beets grown by Evans were paid directly to Crystal. For 1940 and 1941, all of the payments were made to Evans, who paid equivalent amounts to Crystal, and Crystal in turn gave Evans credit for 80% thereof as a payment on account of the indebtedness from Evans to Crystal and took and carried 20% thereof as a portion of the rent provided to be paid under the said agreement.

15. Mandeville was indebted to Crystal when it signed its 1939 contract under crop and chattel mortgages and continued so indebted thereafter. It filed a petition for reorganization under Sec. 75 of the Federal Bankruptcy Act on March 6, 1941 in the [266] District Court of the United States in and for the Northern District of California in proceeding No. 9450. At that time it was indebted to Crystal. An offer of composition or extension was thereafter and in 1941 duly filed by Mandeville, approved by the requisite number of creditors and approved by the court and made effective. Attached hereto is a true and correct copy of Order Confirming the Composition and a true and correct copy of the Offer of Composition or extension. Said order has become final.

16. Thereafter, and on or about March 3, 1944, Crystal executed its written release of Zuckerman and Mandeville and the various mortgages and chattel mortgages thereto given, except a contract dated

January 31, 1944 for the growing and sale of sugar beets on Mandeville Island.

17. During the crop years 1939, 1940 and 1941, Crystal's Oxnard factory had certain equipment known as a "Steffens House," which used a process known as the "Steffens Process," under which molasses was processed into sugar. During said period of time Crystal's Clarksburg factory had no such equipment. In the ordinary or normal process of manufacturing sugar from sugar beets during those years, the beets were reduced to sugar and in the process molasses and [267] beet pulp were produced as by-products. In the Steffens process the molasses was processed into sugar in the Steffens House.

18. During said crop years, molasses resulting from the manufacture of sugar beets into sugar at Clarksburg was shipped by Crystal to Oxnard and put through the Steffens Process there. There was also put through the same process the molasses secured from Oxnard from the manufacture of beets into sugar by the normal process. The sugar resulting from the processing of molasses (produced from beets processed into sugar at Clarksburg and at Oxnard) through the Steffens House at Oxnard and the sugar resulting from the normal processing at Oxnard of beets produced under Oxnard contracts and beets produced under Clarksburg contracts and shipped to Oxnard, were mingled together and sold in interstate and intrastate commerce by Crystal without regard to the origin of the sugar and it was impossible to distinguish one type of sugar from the other.

19. During the same crop years, cane molasses

that resulted as a by-product of manufacture of sugar cane grown in the Hawaiian Islands, was shipped to Oxnard. Some of this molasses was extracted either in the Hawaiian Islands and shipped from there or in [268] Northern California. This molasses, together with some of the molasses that resulted from the manufacture of beets (including both beets shipped directly to Oxnard and beets shipped from Clarksburg to Oxnard), was mixed at Oxnard with pulp that resulted from the manufacture of beets into sugar by the normal process. This molasses-moistened pulp was called "molasses pulp" and was sold during said years by Crystal.

20. The beets manufactured into sugar at the Oxnard plant of Crystal during said cropping years and grown under Oxnard contracts, were grown in the following counties: Ventura, Santa Barbara, San Luis Obispo, Los Angeles, Orange, San Bernardino, Kern, Tulare, King and Fresno.

21. Crystal's net returns from sugar sold from the Oxnard factory during the years 1937, 1938 and 1942 are as follows:

1937	3.8936
1938	3.2374
1942	4.330

22. The amount of cane molasses shipped to Oxnard as above set forth, during the cropping years 1939, 1940 and 1941, was as follows: [269]

1939	5,730.28 tons;
1940	6,133.55 tons;
1941	5,359.74 tons.

In the District Court of the United States for
The Northern District of California

No. 9450

(Proceedings under Sec. 75 National
Bankruptcy Act)

In the Matter of

MANDEVILLE ISLAND FARMS, INC.,
Debtor.

ORDER CONFIRMING A COMPOSITION OR
EXTENSION PROPOSAL UNDER
SECTION 75

An application for the confirmation of the proposal offered by the debtor under Section 75 of the Bankruptcy Act having been filed in court and having been duly and regularly set for hearing and notice thereof having been duly given as by law required, and it appearing and the Court finds that the proposal has been accepted by a majority in number of creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; and it also appearing and the Court finds that the proposal includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; and that said [270] plan is for the best interests of all creditors; and that the offer and its acceptance are in good faith and have not been made or procured by any means, pre-

mises, or acts contrary to the acts of Congress relating to bankruptcy:

It is therefore hereby ordered, adjudged and decreed that the said proposal be, and it hereby is, confirmed; and

It is further ordered, adjudged and decreed that said plan is now effective and binding upon the debtor, upon all persons having an interest herein or any claim against the debtor or any of its assets or against any of the property, real or personal, referred to in the plan, including all creditors of the debtor and all shareholders of the debtor and all persons claiming to have any lien, claim, encumbrance or charge against any of the assets of the debtor or any of the property referred to in the plan, and upon all other interested persons; and

It is further ordered, that either in the event of any failure to carry out any of the terms and conditions set forth in said plan or in the event of the carrying out of said plan, the rights and remedies accorded interested parties as set forth in said plan shall be their sole rights and remedies and shall be [271] available to them as set forth in said plan and not otherwise; and

It is further ordered that this plan shall be binding upon all creditors of the debtor whether they have or have not filed consents to the plan and whether they have or have not filed claims with the Conciliation Commissioner or with this Court; and

It is further ordered that reference to the Commis-

sioner heretofore made is herewith terminated, except as to any objections that might have been filed by the debtor or some creditor to one or more claims heretofore filed in these proceedings. In the event that any such objections have been filed, then the reference to the Commissioner is herewith limited to the adjudicating of any and all such objections and such reference shall terminate upon the filing by said Commissioner of his written findings regarding the last such objections.

Dated: This 23rd day of June, 1941.

MARTIN I. WELSH,
United States District Judge

Approved as to form:

STANLEY ARNDT & NAT BROWN

By STANLEY ARNDT
Attorney for Debtor

WALTER SEVERSON
Attorney for The Anglo California National Bank of
San Francisco

DOWNEY BRANT & SEYMOUR,
Attorney for American Crystal Sugar Company.

In the District Court of the United States in and
for the Northern District of California,
Northern Division

Civil Action—File No. 9450

(Proceedings under Sec. 75 National
Bankruptcy Act)

In the Matter of

MANDEVILLE ISLAND FARMS, INC.,
Debtor.

OFFER OF COMPOSITION OR EXTENSION
To the Creditors and Shareholders of Mandeville
Island Farms, Inc., Debtor:

The undersigned Debtor, who has filed its petition
and schedules under Section 75 of the Bankruptcy
Act as amended, hereby offers a composition or ex-
tension as follows:

Plan of Composition or Extension of Mandeville
Island Farms, Inc.

Preliminary Statement

This Debtor is the owner of certain real property
situated in the County of San Joaquin, State of Cali-
fornia, described as follows, to wit:

All land lying within the exterior boundaries of
“Delta Farms Reclamation District No. 2027” the
exterior boundaries of which district are described
as follows, to wit:

Commencing at the junction of the south bank of
San Joaquin River with the east bank of Old River
near the southeast corner of Section 30, Township 3

North, Range 4 East, Mount Diablo Base and Meridian; thence following the east bank of Old River upstream to its junction with the north bank of (big) Connection Slough; thence easterly along the north bank of said Slough to the junction thereof, near the north and south section line between Sections 21 and 22, in Township 2 North, Range 4 East, Mount Diablo Base and Meridian with a dredger cut running from said slough to Middle River in said Sections; thence southeasterly along the center line of said dredger cut to the westerly bank of Middle River; thence downstream along the west bank of Middle River to the junction thereof with the southerly bank of San Joaquin River; thence downstream along said bank in a northwesterly direction to the connection thereof with the east bank of Old River and the point of commencement.

Except the following:

Those certain six parcels of land conveyed by Empire Navigation Company, a corporation, to City of Stockton, a municipal corporation, by deed dated May 19, 1930 and recorded May 28, 1930 in Book of Official Records, Vol. 316, page 25, which said parcels contained in the aggregate 213.75 acres, more or less.

The Debtor also is the owner of interests in personal property which are the subject of various conditional sale agreements and chattel mortgages. It is difficult, if not impossible, accurately to estimate the present fair value of the land and equipment. The Debtor owes taxes in the sum of approximately

\$5,602.40, owes its secured creditors approximately \$1,099,265.32, and owes its unsecured creditors approximately \$130,585.87. It is believed that the foregoing obligations materially exceed the value of the Debtor's assets.

The records of the County Recorder of the County of San Joaquin show the following deeds of trust affecting said property:

(a) Deed of trust from the Debtor to American Trust Company, a corporation, trustee for Disaster Loan, dated Dec. 31, 1938, recorded Jan. 5, 1939, in Vol. 590 Official Records, p. 147.

(b) Deed of trust from Debtor to Security Title Insurance and Guarantee Company, a corporation, Trustee for Empire Farms, dated March 14, 1938, recorded May 26, 1938, in Vol. 610 Official Records, p. 54. The beneficial interest in said deed of trust was assigned to Anglo Bank by instrument dated June 6, 1938, recorded June 13, 1938, in Vol. 614 Official Records, p. 269. By instrument dated Dec. 31, 1938, recorded Jan. 5, 1939, in Vol. 630 Official Records, p. 461, the lien of said deed of trust was made subordinate to the deed of trust to Disaster Loan Corporation.

(c) Deed of trust from Debtor to The Anglo Safe Deposit Company, trustee for Empire, dated July 15, 1940, recorded July 26, 1940 in Vol. 675 Official Records, p. 284. By instrument dated July 31, 1940, recorded September 11, 1940, in Vol. 707 Official Records, p. 155, the beneficial interest in said deed of trust was assigned to the Anglo Bank.

The Official Records of the County Recorder's office of San Joaquin County show various crop mortgages, subordination agreements, non-disturbance agreements and other agreements in favor of or for the benefit of Crystal. These are as follows:

Date and description of document	Executed by	Date recorded and recordation data
(a) Crop mortgage, dated April 1, 1938	Debtor	May 26, 1938, Vol. 620, p. 96
(b) Subordination agreement	Empire	Jan. 24, 1939, Vol. 612, p. 410
(c) Crop mortgage, dated Jan. 5, 1939	Debtor	Jan. 24, 1939, Vol. 642 Of. Rec. p. 12
(d) Crop mortgage, dated Sept. 15, 1939	Debtor	Oct. 4, 1939, Vol. 660 Of. Rec. p. 279
(e) Crop mortgage, dated Jan. 1, 1940	Debtor	Feb. 10, 1940, Vol. 679 Of. Rec. p. 157
(f) Subordination agreement, dated Feb. 5, 1940	Stockton Sav. & L. Bank	Feb. 10, 1940, Vol. 671 Of. Rec. p. 470
	Pacific Guano	
	Anglo Bank	
(g) Non-disturbance agreement, dated Feb. 5, 1940	Empire	Feb. 10, 1940, Vol. 676 Of. Rec. p. 261
	Anglo Bank	
(h) Crop mortgage, dated Apr. 15, 1940	Debtor	April 23, 1940, Vol. 690 Of. Rec. p. 209
(i) Agreement, dated Jan. 27, 1940	Empire	Feb. 10, 1940, Vol. 676 Of. Rec. p. 263
(j) Subordination agreement, dated April 15, 1940	Anglo Bank	April 23, 1940, Vol. 689 Of. Rec. p. 184
(k) Subordination agreement, April 16, 1940	Stockton Savings and Loan Bank	April 23, 1940, Vol. 659 Of. Rec. p. 387
	Pacific Guano	
(l) Subordination agreement, April 15, 1940	Anglo Bank	April 23, 1940, Vol. 695 Of. Rec. p. 80
(m) Non-disturbance agreement, Apr. 15, 1940	Empire	April 23, 1940, Vol. 689 Of. Rec. p. 186
(n) Agreement dated Apr. 15, 1940	Empire	Apr. 23, 1940, Vol. 682 Of. Rec. p. 315

The Official Records of the County Recorder's office of San Joaquin County show the following crop mortgages executed by Debtor to Anglo Bank:

Date of Crop Mortgage	Date of Recordation	Recordation Data
(a) Feb. 1, 1939	Feb. 6, 1939	Vol. 610 Of. Rec. p. 378
(b) Oct. 26, 1939 (To Anglo and others)	Oct. 26, 1939	Vol. 673 Of. Rec. p. 52
(c) Jan. 18, 1940	Feb. 10, 1940	Vol. 673 Of. Rec. p. 436
(d) Jan. 18, 1940	Feb. 10, 1940	Vol. 679 Of. Rec. p. 160
(e) Jan. 18, 1940	Feb. 10, 1940	Vol. 673 Of. Rec. p. 439

The Official Records of the County Recorder's office of San Joaquin County show the following crop mortgages executed by Debtor to Stockton Savings and Loan Bank:

Date of Crop Mortgage	Date of Recordation	Recordation Data
(a) Feb. 1, 1939	Feb. 6, 1939	Vol. 641 Of. Rec. p. 87
(b) Jan. 18, 1940	Feb. 10, 1940	Vol. 686 Of. Rec. p. 11

The Official Records of the County Recorder's office of San Joaquin County show the following crop mortgages executed by Debtor to Pacific Guano:

Date of Crop Mortgage	Date of Recordation	Recordation Data
(a) Feb. 1, 1939	Feb. 6, 1939	Vol. 642 Of. Rec. p. 55
(b) Jan. 18, 1940	Feb. 10, 1940	Vol. 676 Of. Rec. p. 266

All creditors and stockholders of the Debtor will be affected by the plan. Without necessarily suggesting classification for purposes of voting upon this plan, they may be grouped as follows:

(1) Claimants for taxes;

(2) Creditors secured by deeds of trust (Disaster Loan Corporation; The Anglo California National Bank of San Francisco);

(3) Holders of conditional sale contracts and chat-

tel mortgages covering equipment used by the Debtor;

(4) Holders of crop mortgages upon present or future crops of the Debtor (American Crystal Sugar Corporation, The Anglo California National Bank of San Francisco, Pacific Guano Company and Stockton Savings and Loan Bank);

(5) Unsecured creditors;

(6) Shareholders.

Article I.

Definitions

Unless the context otherwise requires, the following terms used in this plan shall have the following meanings:

“Anglo” means The Anglo California National Bank of San Francisco, a national banking association, and a creditor of this Debtor.

“Chattel Mortgage” means mortgage on personal property other than crops.

“Commissioner” means the Conciliation Commissioner to whom the proceedings were referred by the Court.

“Court” means the Court in these proceedings, the United States District Court for the Northern District of California.

“Crystal” means American Crystal Sugar company, a corporation which is a creditor of the Debtor.

“Debtor” means Mandeville Island Farms, Inc., a corporation which has filed a petition herein stating that it desires to effect a plan of composition or extension.

“Disaster Loan” means Disaster Loan Corporation, a United States Government agency and a creditor of this Debtor.

“Equipment” means all personal property in which the Debtor has an interest.

“Judge” means the Judge of this Court.

“Lease” means the Lease and Agreement to be executed by Anglo and others as in this plan provided.

“Net proceeds” means gross returns from sale of crops after repayment of any advances for financing them, minimum rent or crop share rent, payments on balance of 1940 financing (applicable only to 1941 crops), and \$750.00 per month to Zuckerman, less costs of planting, cultivating and harvesting such crops not financed under any crop mortgage thereon and less income and franchise taxes upon the net income of Zuckerman and the Debtor from the operation of the property.

“Pacific Guano” means Pacific Guano Company, a corporation which is a creditor of this Debtor.

“Section 75” means Section 75 of the Act of Congress of July 1, 1898, entitled “An Act to Establish a Uniform System of Bankruptcy throughout the United States,” as amended.

“Stockton” means Stockton Savings and Loan Bank, a corporation which is a creditor of this Debtor.

“The property” means the real property hereinabove described and commonly known as Mandeville Island.

“These proceedings” means the proceedings pending herein under Section 75.

“Zuckerman” means Roscoe Zuckerman, the president and sole stockholder of the Debtor.

Article II.

Transfer of Properties and Release of Liens

All persons who are the owners of any liens or encumbrances of record upon the property and all persons who are parties to agreements of record affecting the property will release, reconvey and extinguish all of such liens, encumbrances, agreements and rights, with the following exceptions:

- (a) Any liens for taxes;
- (b) Any rights of way or easements of record;
- (c) Any rights of record of Delta Farms Reclamation District No. 2027;
- (d) Any rights of record of Sacramento-San Joaquin Drainage District;
- (e) Any rights of record of Bishop Oil Company under a certain oil and gas lease executed on July 2, 1936 by Empire Farms, Inc.;
- (f) Any rights of the parties to that certain action now pending in the Superior Court of the State of California, in and for the County of San Joaquin, entitled “Empire Navigation Co., a corporation, et al., Plaintiff, vs. Harry C. Adams, et al., Defendants”, numbered 24804 in the records of said Court;
- (g) Any rights of Disaster Loan under that certain deed of trust dated December 31, 1938 and recorded in Volume 590 of Official Records, page 147, San Joaquin County Records;

(h) All rights of the parties to that certain action entitled "Ernest H. Denicke, plaintiffs vs. Anglo California National Bank, defendant" now pending in the District Court of the United States for the Northern District of California, Southern Division, and numbered 21033(S) in the records of said Court;

(i) Any rights of Crystal under a certain chattel mortgage upon six trucks used by the Debtor.

(j) Any rights of Crystal under that certain crop mortgage to it covering 1940 crops raised upon the property and any rights of Crystal under a certain assignment from Mandeville of the sugar beet allotment elsewhere herein described.

All of said liens and other rights, with the exceptions above noted, having been released and reconveyed of record, it is proposed that this Debtor convey the property to Anglo by deed. It is further proposed that Anglo will acquire clear title to any equipment as to which it holds title under any conditional sale contracts or any lien under any chattel mortgage by bill of sale from the Debtor.

The effect of these transactions if consummated will be that the Anglo, which now holds various deeds of trust, crop mortgages, chattel mortgage and conditional sales contracts, will acquire title to the real property and to certain of the equipment now subject to chattel mortgage (including that subject to said chattel mortgage under the after-acquired clause therein contained) or conditional sale contracts in its favor free and clear of any encumbrances of other creditors and free and clear of any claim of this Debtor. When these purposes have been accom-

plished Anglo will enter into a lease with Roscoe Zuckerman, individually, covering the property and equipment so acquired by it.

The following persons, holding conditional sales agreements covering personal property used by the Debtor, shall retain all their present rights therein:

Wm. C. & Henry J. Colberg (one oil screw boat, official No. 221496, inland freight, net tonnage 92 tons, known as "M/V Mandeville").

International Harvester Co. (T. D. 40 Tractor, Farmoll Tractors).

Martini & Arrighi (one grain harvester).

Moore Equipment Co. (one AC tractor).

Pacific Gas & Electric Co. (electric water heaters).

Morthrift Company of America and Morthrift Finance Co. (a harvester).

Morthrift Finance Co. and Morthrift Company of America (a bull-dozer).

Julius Harning and Horning Implement Co. (covering scrapers).

Channel Shop (lien for laborer's and mechanic's services and parts and materials furnished to and on personal property, consisting of farm machinery, equipment and tools pursuant to the provisions of Section 3051 et seq. of the Civil Code of the State of California.

Article III.

Lease and Option to Purchase

It is proposed that the Debtor, Zuckerman, Anglo, Crystal, Pacific Guano and Stockton will join in granting to Zuckerman a lease and option to buy the property and certain equipment, a copy of which

is hereunto attached, marked "Exhibit A", and is hereby made a part of this plan.

Article IV.

Effect of Plan on Creditors and Shareholders

This plan will affect the creditors and shareholders of the Debtor as follows:

(1) Tax claimants.

The Anglo will pay forthwith all delinquent and current taxes upon the property and any equipment acquired by it hereunder.

(2) Holders of deeds of trust.

Disaster Loan will retain its first deed of trust upon the property and all existing stand-by agreements and so long as the lease is in good standing Anglo will protect the parties to this plan from the termination of the lease due to any foreclosure of or sale under said deed of trust. If the lease is performed Anglo will receive \$462,000.00 as the purchase price of the property and any equipment acquired by it hereunder. The minimum rental will provide a sum of not to exceed \$7,000.00 for levee repair per year, taxes and insurance and \$12,000.00.

(3) Holders of conditional sale contracts and chattel mortgages.

(a) The rights of those persons, other than Anglo, holding conditional sales agreements or chattel mortgages covering personal property are to stay as they are. Zuckerman shall have the right to turn back to each such person the property that is the subject of his conditional sales agreement provided he se-

cures the release of the Debtor of all claims under such contract, or he may make a new individual contract with such contract holder provided he secures the release of the Debtor. If any conditional sales creditor will not do either of these things, then his security shall be valued and shall be allowed as an unsecured claim for any deficiency above the value of the lien so found.

(b) As to any personal property acquired by Anglo, the performance of the lease and agreement above described will result in Anglo's receiving \$62,000.00, the approximate present value of that property, as a part of the total purchase price of \$462,000.00.

(4) Holders of crop mortgages.

All crop mortgages now in existence, except the crop mortgages held by Crystal on 1940 crops and the sugar beet allotment for 1940, will be released and the only new crop mortgages which will be placed against the property will be in favor of persons providing annual financing of the crops.

As to the indebtedness owed to Crystal on account of crop financing for 1940 and prior years, Crystal will receive as credits on account of such indebtedness, including the interest thereon, the following:

(1) all of the remaining 1940 potato crop and its proceeds now or hereafter received (including the dug but unsold potatoes and that portion of the crop still in the ground and which it is anticipated will be harvested during the Spring of 1941); (2) all additional proceeds from the 1940 crop of sugar beets; (3) the moneys now on deposit in the registry

of this court in the sum of \$40,452.28, being the proceeds of the payment by the Secretary of Agriculture under the Sugar Act of 1937 on account of the 1940 crop of sugar beets grown by said Debtor; and (4) after repayment of all moneys advanced by Crystal or others, together with the interest thereon, for the financing of the 1941 crops and after payment to Anglo of the sum of \$6200.00 Crystal shall receive all further proceeds of said 1941 crops of sugar beets, onions and potatoes until said existing indebtedness due and owing to Crystal has been paid in full with the interest thereon. After such payments and the payment of the crop share rental or minimum rental to Anglo and the payment of \$750.00 a month to Zuckerman for each month during each crop year while the lease is in effect, Anglo, Pacific Guano and Stockton will share pro rata in $\frac{2}{3}$ of 50% of any net proceeds of such crop (see definition of "net proceeds" above).

(5) Unsecured creditors.

The unsecured creditors, exclusive of Anglo, will receive pro rata $\frac{1}{3}$ of 50% of the net proceeds of each year's crops (see definition of "net proceeds" above). If by the time Anglo and Crystal have been paid in full the unsecured creditors have not been paid in full, 50% of all net proceeds of crops will be paid to such creditors pro rata until they are paid in full. The other 50% will be used to continue the current operating fund hereinafter described.

(6) Shareholders.

The shareholders will receive nothing as such.

Article V.

Annual Crop Financing

Crystal has advanced to Mandeville or Zuckerman certain money for current crop financing for 1941 and expects to advance sufficient further funds to enable Zuckerman to plant, cultivate, harvest and sell approximately 975 acres of sugar beets, 300 acres of potatoes and 93 acres of onions, under budgets in amounts already agreed upon between Anglo, Crystal and Zuckerman.

If Zuckerman desires to plant corn in 1941 and requires financing therefor, such financing will be obtained from some person other than Crystal and the repayment of all advances for that purpose shall be secured by a first crop mortgage upon such corn crop. Anglo will subordinate its rights in such crop in favor of the person making such advances and to the extent thereof, but after repayment of such advances from the proceeds of such crop, Anglo shall receive its crop share rent therefrom and any other proceeds or net proceeds thereof shall be distributed as herein and in the lease generally provided with reference to proceeds and net proceeds of crops.

Loans made by Crystal for 1941 financing of sugar beet, potato and onion crops shall be evidenced by notes executed by Zuckerman to Crystal and said indebtedness together with any and all indebtedness for 1940 and prior crop financing shall be secured by (1) a crop mortgage which shall constitute a first and prior lien covering all crops of sugar beets, potatoes and onions grown upon said real property during 1941; (2) by the assignment and pledge of

any and all payments from the United States or any of its agencies under the Sugar Act of 1937, or any amendatory, supplemental, substitute or corresponding legislation or any State or Federal legislation of similar import, on account of the production of said 1941 crop of sugar beets; and (3) by chattel mortgage covering the items of equipment now covered by that certain mortgage dated May 1, 1940, by and between said Debtor as mortgagor and said Sugar Company as mortgagee, and which was recorded on July 1, 1940, in Vol. 698 of Official Records at Page 158, San Joaquin County Records; and it is understood that a full time timekeeper satisfactory to Sugar Company shall be employed by Zuckerman whose duties shall include the allocation of charges between the several crops and weekly reports thereof and of the farming activities of the previous week to the Sugar Company. Anglo will subordinate all its rights and liens in or upon said 1941 crops of sugar beets, potatoes and onions to the rights and lien of Crystal to secure such payment of said 1941 advances.

Annually after 1941, crop financing may be obtained and repayment of its secured in like manner from Crystal or others except that no provision shall be made as to crops raised in 1942 or subsequent years for payment from the proceeds thereof on account of any balance due Crystal for crop financing in 1940 or any prior year.

After payment from the gross proceeds of any year's crop of (1) advances for financing such crops, with interest; (2) \$6200.00 to Anglo; (3) as to 1941 crops only, the balance due Crystal for crop financ-

ing in 1940 and prior years, with interest at 6 per cent per annum; (4) rental reserved to Anglo; (5) \$750.00 per month to Zuckerman as in the lease provided; net proceeds remaining shall be determined in accordance with the definition thereof herein contained and 50% thereof paid to or retained by Zuckerman to be used by him to keep the lease in good standing or to pay any sums he may see fit under and pursuant to said lease or the option to purchase therein contained, to pay any of the Debtor's franchise and Zuckerman's income taxes on net taxable income from operation of the property and costs of maintenance of levees and drainage and of planting, cultivating, harvesting or marketing crops from the property or of obtaining equipment needed for operations thereon not otherwise paid or provided for.

Article VI.

Cash on Hand

After such provision as shall be made by the Court for the payment of fees and expenses of the Commissioner, all cash now deposited with the Court, representing the government sugar beet allotment for 1940, and any cash in the hands of the Conciliation Commissioner in the proceedings which was derived from sale of any 1940 crops, shall be paid to Crystal. All other unexpended cash advanced by Crystal in the possession of such Commissioner shall be paid to Zuckerman.

Article VII.

Means of Accepting the Plan

The creditors shall approve of the plan by execut-

ing and forwarding to Carl Knudsen, Conciliation Commissioner, at Stockton, California, the formal approval attached hereto.

Article VIII.

Effect of Confirmation of This Plan

Upon the filing with the Commissioner of the approval of this plan by a majority in number and amount of the creditors filing claims in these proceedings, and the confirmation of the plan by this court, this plan shall immediately become effective and binding upon the Debtor and all persons and corporations having an interest herein whether as creditors or shareholders. It is understood that the plan will, by such confirmation, be approved as a fair and equitable solution of the Debtor's affairs under the proceedings herein taken, and after the date of such confirmation the rights of all interested persons shall be solely as set forth in this plan. In the event of any failure to carry out any of the terms and conditions herein agreed to be performed and observed, the rights and remedies accorded interested parties under such circumstances by this plan shall be their sole rights and remedies and shall be available to them without further delay.

Immediately upon such confirmation the reference to the Commissioner shall terminate, unless prior to the date of confirmation objections shall have been filed by the Debtor or some creditor to one or more claims theretofore filed in the proceedings. In the latter event such reference shall terminate upon the filing by the Commissioner with the Court

of his written findings regarding the last of such objections.

Article IX.

Means of Effecting the Plan

Each of the persons interested in the affairs of the Debtor will execute any and all documents and pleadings reasonably necessary to effectuate the purposes of the plan, including any and all releases and reconveyances, deeds and bills of sale, crop mortgages, chattel mortgages, agreements of lease and option, releases of claim, subordinations and stipulations for withdrawal of funds, and the Court shall have jurisdiction to order any of these things to be done upon the application of any person interested in these proceedings.

Dated: May 7, 1941.

Respectfully submitted,

MANDEVILLE ISLAND FARMS, INC.

/s/ By R. C. ZUCKERMAN,

President.

EXHIBIT A

Lease and Agreement

This Agreement, entered into as of January 1, 1941, between The Anglo California National Bank of San Francisco, hereinafter called "Anglo", Roscoe Zuckerman, hereinafter called "Zuckerman", Mandeville Island Farms, Inc., hereinafter called "Mandeville", American Crystal Sugar Company, hereinafter called "Crystal", Pacific Guano Company, hereinafter called "Pacific", and Stockton Savings and Loan Bank, hereinafter called "Stockton";

Exhibit A—(Continued)

Witnesseth:

(1) The parties hereto do hereby severally release, remise and forever quitclaim to Anglo, its successors and assigns, all rights, titles, interests, deeds of trust, mortgages, crop mortgages and liens of every kind, nature and description, which they may respectively have or claim against any real property now standing in the name of Mandeville or any crops now or hereafter grown thereon, (except crop mortgage to Crystal dated April 15, 1940 recorded 690 O. R. 209) and particularly in or to the following described real property:

All of that certain real property situated in the County of San Joaquin, State of California, described as follows, to wit:

All land lying within the exterior boundaries of "Delta Farms Reclamation District No. 2027" the exterior boundaries of which district are described as follows, to wit:

Commencing at the junction of the south bank of San Joaquin River with the east bank of Old River near the southeast corner of Section 30, Township 3 North, Range 4 East, Mount Diablo Base and Meridian; thence following the east bank of Old River upstream to its junction with the north bank of (big) Connection Slough; thence easterly along the north bank of said Slough to the junction thereof, near the north and south section line between Sections 21 and 22 in Township 2 North, Range 4 East, Mount Diablo Base and Meridian with a dredger cut running from said slough to Middle River in said Sections; thence

Exhibit A—(Continued)

southeasterly along the center line of said dredger cut to the westerly bank of Middle River; thence downstream along the west bank of Middle River to the junction thereof with the southerly bank of San Joaquin River; thence downstream along said bank in a northwesterly direction to the connection thereof with the east bank of Old River and the point of commencement.

Except the following:

Those certain six parcels of land conveyed by Empire Navigation Company, a corporation, to City of Stockton, a municipal corporation, by deed dated May 19, 1930 and recorded May 28, 1930 in Book of Official Records, Vol. 316, page 25, which said parcels contained in the aggregate 213.75 acres, more or less.

Each such party hereby covenants upon demand of Anglo to execute, acknowledge, deliver and record any and all deeds, releases or other documents reasonably required by Anglo fully to effectuate the provisions hereof. The foregoing provisions are, however, expressly made subject to the other terms, covenants and conditions hereinafter contained.

(2) Mandeville and Zuckerman hereby jointly and severally sell, assign, transfer and set over to Anglo all that certain personal property described in a schedule hereunto attached, marked "Exhibit A", and hereby made a part hereof, (which said property shall include all property now subject to any chattel mortgage or conditional sale agreements

Exhibit A—(Continued)

executed between Mandeville or Zuckerman and Anglo) and Mandeville and Zuckerman agree that they will execute and deliver any and all bills of sale thereto which Anglo may reasonably require to vest clear title to said property in Anglo subject to this agreement.

(3) If and when, Anglo acquires clear title to the aforesaid personal property, and clear title to the aforesaid real property subject only to liens for taxes, easements and rights of way of record, rights of record of Delta Farms Reclamation District No. 2027 and Sacramento-San Joaquin Drainage District, any rights of Disaster Loan Corporation under deed of trust dated December 31, 1938, any rights of record of Bishop Oil Co. under an oil and gas lease dated July 2, 1936, and any rights of the respective parties to Empire Navigation Co. v. Adams (Superior Court, San Joaquin County, No. 24804) or Denicke v. Anglo California National Bank (U. S. District Court, Northern District of California, No. 21033-S), any rights of record of Crystal under any crop mortgage covering 1940 crops, and any assignment of the sugar beet allotment of 1940, then and in that event and as of the date of final acquisition of such titles Anglo hereby leases to Zuckerman all of said real and personal property for a term of twelve (12) years, ending December 31, 1953, upon the terms, covenants and conditions hereinafter contained.

Exhibit A—(Continued)

(4) Zuckerman will pay to Anglo and Anglo reserves to itself as rent for said property the following sums of money and things of value:

(a) Twenty per cent (20%) of the sugar beets, fifteen per cent (15%) of the potatoes and onions, and twenty-five per cent (25%) of the corn, grain or beans raised and fifteen per cent (15%) of the peat sold each year upon or from the land above described during the life of this agreement. If any such crop share rent is sold the buyer thereof shall pay to Anglo directly the proceeds thereof.

(b) An additional sum by which \$27,200.00 as minimum rent for said real property plus \$6,200.00 as minimum rent for said personal property exceeds the proceeds of the crop share rental for the year 1941, as hereinabove provided;

(c) An additional sum by which \$36,000.00, as minimum rent for said real property, plus \$6,200.00 as minimum rent for said personal property, exceeds the proceeds of the crop share rental hereinabove described, for each year beginning January 1, 1942 and ending December 31, 1953.

(d) An additional sum of \$75,000.00 payable on or before December 31, 1943, and a further sum of \$25,000.00 per annum, payable upon December 31st of each year, beginning December 31, 1944, and ending December 31, 1953; provided, however, that of the sums payable under subparagraphs (a), (b) and (c) of this Paragraph 4, hereinabove set forth, there

Exhibit A—(Continued)

shall be credited to the payments required under this subdivision (d) hereof the following:

(1) All sums by which the proceeds of the crop share rental exceeds the minimum rental described in subparagraphs (b) or (c) above.

(2) Seventy per cent (70%) of each minimum payment of \$6,200.00 required above.

(3) \$8,800.00 out of each minimum payment of \$36,000.00 described above.

(4) Any additional rent paid to Anglo under the provisions of Paragraph 14 hereof.

In the event of the exercise of the options hereinafter granted to purchase the aforesaid real and personal property, or to purchase the personal property only, any sums paid under this sub-paragraph (d) shall first be applied to the purchase price of the personal property until such price is paid in full, and then to the purchase price of the real property.

(5) All annual payments required of Zuckerman hereunder shall be made on December 31st of each year beginning December 31, 1941. The proceeds of crops raised upon the property described above and of Anglo's share thereof shall be determined in the first instance by the estimate of Crystal, or such other person as may have financed the planting and harvesting of the particular crop, such estimates to be made on or before December 31st of each year. Such determination shall fix the obligation of Zuckerman to pay any deficiency between the crop share rental

Exhibit A—(Continued)

hereunder and any minimum requirements applicable to the year involved, subject, however, to adjustment upon a final determination of the proceeds of such crops when the sale thereof has been completed. Any payment made or to be made under the Sugar Act of 1937 or any amendatory, supplemental, substitute or corresponding legislation or any State or Federal legislation of similar import will be estimated in like manner and shall be treated hereunder as if such payment constituted the proceeds from crops raised upon said property. All soil conservation payments shall go to Zuckerman.

(6) Anglo grants to Zuckerman the option to purchase the real and personal property hereinabove described either together or separately at any time on or before December 31, 1953 and while Zuckerman is not in default in the performance of this agreement or of any term, covenant or condition herein contained on his part to be performed, upon the following terms and conditions: The price of the land shall be \$400,000.00 and the price of the personal property shall be \$62,000.00, but upon exercise of the option there shall be credited against such price the amount of money theretofore paid by Zuckerman to Anglo under the provisions of subparagraph (d) of Paragraph 4 of this agreement. If either alone or in conjunction with the purchase of the real property the option to purchase the personal property is exercised, then such credits shall first be applied to the purchase of the personal property until it is paid in full. Zuckerman may exercise

Exhibit A—(Continued)

any such option by giving thirty days prior written notice thereof to Anglo and by depositing within such thirty day period with Anglo or the escrow holder hereinafter mentioned a sum of money equal to the difference between the credits against the purchase price of the property to be purchased and the total purchase price of such property. Taxes and minimum rentals shall be prorated as of the date of payment of the balance of the purchase price.

(7) If and when the said Zuckerman gives said notice of exercise of any of the aforesaid options, Anglo shall deposit with any bank or title company as escrow holder satisfactory to Zuckerman a deed and/or bill of sale conveying and transferring to Zuckerman the real and/or personal property to be so purchased free and clear in each instance of all encumbrances, except those existing at the time title to the same was acquired by the Anglo hereunder (other than property taxes and the aforesaid deed of trust to Disaster Loan Corporation), and except other liens or encumbrances placed thereon with the consent of Zuckerman, and will instruct said escrow holder to deliver said deed and/or bill of sale to Zuckerman upon payment to Anglo of the balance of said purchase price described in Paragraph 6 hereof. It is understood, however, that Anglo shall not be required to furnish any policy of title insurance upon any such property and shall have no responsibility whatsoever in connection with the exercise of any such option or the transfer of any such property for the then condition of any real or per-

Exhibit A—(Continued)

sonal property involved, and particularly Anglo shall have no liability or responsibility to convey any personal property which has by then been lost, destroyed, or exhausted, nor any improvements now situated upon the real property which have by then been destroyed, worn out or removed. If the option to purchase the real property has been exercised, Anglo will further, at such time and to the extent that it is legally possible to do so, transfer, assign and set over unto Zuckerman any then existing sugar or other crop or land allotments relating to said real property, to the end that Zuckerman shall be entitled to such allotments from that time forward.

(8) It is recognized that Anglo claims that Zuckerman is obligated to it under a continuing guaranty of certain obligations of Mandeville, and as to such obligations Zuckerman waives any right that he may otherwise hereafter acquire by any future failure of Anglo to act in connection with such obligation, and Anglo agrees that upon the exercise of the option herein granted to purchase both the real and personal property above described and the conveyance by Anglo to Zuckerman or upon complete surrender by Zuckerman to Anglo of all his rights in and to the real and personal property, Anglo will release any and all claims that it may have against Zuckerman under or in connection with such alleged guaranties. Nothing herein contained shall, however, be construed to constitute a release of any other guaranties of any obligations of Mandeville that Anglo may have, nor shall anything herein contained be deemed

Exhibit A—(Continued)

to be an admission by Zuckerman of any liability under any guaranty.

(9) Anglo will out of the minimum cash rental to be received hereunder,

(a) Permit Zuckerman to use up to but not exceeding the sum of \$7,000.00 per year to repair the levees which are designed to protect the real property above described, upon the condition, however, that all work done upon such levees shall be done under the supervision and to the satisfaction of Anglo;

(b) Pay all real and personal property taxes assessed against any of the property above described which is subject to this agreement during the term hereof;

(c) Pay all cost of fire insurance upon the improvements on said real property and upon the personal property above described up to but not exceeding total annual premiums of \$1200.00, all such insurance to be effected in companies and in form satisfactory to Anglo, with loss payable to Anglo and Zuckerman as their interests may appear.

(10) Any and all proceeds of any oil or gas leases now or hereafter placed upon the real property above described shall be paid to Anglo and credited and allocated in the same manner as proceeds from the sale of crops, without being subject to any provisions herein contained relative to the subordination of the rights of Anglo to any crop mortgages.

(11) For the year 1941, and thereafter so long as

Exhibit A—(Continued)

Zuckerman shall not be in default hereunder, Anglo will subordinate all of its right, title and interest in and to any crops raised upon the real property above described and in and to any government benefit relating thereto for the following purposes and in the following manner:

(a) Annually to the extent of any money, together with interest thereon, advanced by Crystal or any other financially responsible person approved by Zuckerman which is reasonably necessary to finance such crops in such acreages as Zuckerman and the person providing such financing shall have agreed to be advisable upon the basis of estimated costs and yields furnished in connection therewith.

(b) As regards sugar beet, potato and onion crops for 1941, in favor of Crystal (after repayment of Crystal's advances for financing said crops and after payment to Anglo out of the gross proceeds of such crops of a pro rata of \$6200.00 payable out of the gross proceeds of all crops for 1941) to the extent of the unpaid balance of advances made by Crystal for financing crops upon the real property for 1940 or any prior year.

(12) Out of gross proceeds of any year's crops after 1941 Anglo shall receive, after payment of advances for financing of such crops, its crop share rent hereunder or the minimum rent whichever is larger. As to the 1941 crops Anglo shall receive, after repayment of advances for financing such crops, a pro rata of the sum of \$6200.00 payable out of all crops and its crop rent share of any corn crop, and

Exhibit A—(Continued)

then, after repayment to Crystal of the unpaid balance of its crop financing advances for 1940 and prior years, Anglo's crop share rental of sugar beets, potatoes and onions less such pro rata of \$6200.00.

(13) After the payments described in Paragraph 12 have been made, the net proceeds of each such crop shall be determined by deducting from any remaining gross proceeds costs of planting, cultivating and harvesting such crops not obtained by advances under any crop mortgage herein provided for, \$750.00 per month to be paid to Zuckerman for each month during the particular crop year involved during which this lease was in good standing, and Federal and State income taxes payable by Mandeville or Zuckerman upon taxable net income obtained by them or either of them from the operation of the property during such year and such net proceeds shall be paid and applied as follows:

(a) Fifty per cent (50%) thereof to Zuckerman to be used as a special fund for operations and working capital in paying corporate franchise and other taxes of Mandeville, meeting any payments required hereunder in order to keep this agreement in full force and effect, or any payments whatever to Anglo permitted or required hereunder, or in paying any costs of maintenance of levees and drainage of land, planting, cultivating, harvesting or marketing crops grown upon the real property above described or in purchasing necessary equipment for the operating of such property, provided such expenditures are consistent with the efficient, economical and accepted

Exhibit A—(Continued)

farming methods in the locality of Mandeville Island;

(b) Two-thirds of the other fifty per cent (50%) of such net proceeds to Stockton to be paid by it: 13/140ths to Pacific Guano, 27/140ths to Stockton and 100/140ths to Anglo until said parties have respectively received \$13,000.00, \$27,000.00 and \$100,000.00;

(c) One-third of such other fifty per cent (50%) to Carl Knudsen of Stockton, California as an individual disbursing agent for the unsecured creditors of Mandeville and not in any official capacity either as Conciliation Commissioner, Referee, Special Master or otherwise, to be paid by him by check signed by himself and Zuckerman, after deducting his reasonable costs, expenses and compensation, to the unsecured creditors of Mandeville, excluding Anglo, prorata, until said creditors have been paid the amount of their allowed claims in full.

(14) After the claims of the persons described in subdivisions (b) and/or (c) of the next preceding paragraph of this agreement have been fully paid, the net proceeds theretofore allocated to claims so paid shall be paid to Anglo as additional rent hereunder, provided that in the event of the exercise of the option hereinabove granted, such additional payments shall constitute a credit against the purchase price of any property purchased hereunder, first credit to be against the purchase price of the per-

Exhibit A—(Continued)

sonal property if the option to purchase it is exercised.

(15) For the further protection of Anglo in the event that Zuckerman should fail fully to perform it, Zuckerman will forthwith upon the execution hereof pledge to Anglo as security for the performance hereof all of the issued and outstanding capital stock of Mandeville under an agreement in form satisfactory to Anglo.

(16) Zuckerman will operate and use the property as a farm in the manner herein set forth, and for no other purpose and in no other manner. Zuckerman agrees in due and proper season and in accordance with the best standards of farming in the community in which the real property is located, to do all things necessary or customary in the conduct of such operations, including, without limiting the generality of the foregoing, proper plowing, cultivating, preparation for planting, planting, replanting when necessary, spraying, dusting, draining, irrigating, pruning, harvesting, processing, curing, drying, preparing for market and summer fallowing (fertilizing to be done entirely at Zuckerman's option). Zuckerman agrees, to the extent that it is the customary practice in such locality and only to such extent: specifically to exercise diligence to keep the property free from foul or injurious plants or weeds and to exterminate rodents and other animal pests; to sow no foul seed on the property, or any part thereof. Anglo may inspect all seed proposed to be

Exhibit A—(Continued)

sown or planted prior to the planting and if any such seed is rejected by Anglo on reasonable grounds Zuckerman will procure proper seed. Zuckerman will use such approved methods as may be customary for the effective checking and elimination of any blight, disease, or insect infestation which appears in any growing crop.

Except as herein otherwise specifically provided, all acts to be performed by Zuckerman shall be performed at his own cost and expense, and he shall furnish at his own cost and expense all labor, seed, material, tools, machinery, equipment, sacks, containers, wagons, trucks, and all other things used in connection with the performance of said acts.

The crop rental reserved hereunder to Anglo shall be of like kind and quality as the share retained by Zuckerman. Except as herein otherwise specifically provided, Zuckerman shall at his own cost and expense properly harvest Anglo's shares of all crops, process them, and do all other things customarily done to prepare them for market, and deliver them at the property in the customary type of container which Zuckerman shall supply. If Anglo shall take its share of any crop in kind, the fair market value thereof upon the date of delivery shall be credited against any obligation of Zuckerman hereunder to which such crop share rental is to be applied.

(17) Zuckerman shall pay when due and before delinquent, all costs of operation of the property, all charges for water for irrigation or other purposes,

Exhibit A—(Continued)

all charges for light, heat, power, and any and all public utility services used in or on the property during the term of the lease and option.

(18) Zuckerman shall not assign this lease and agreement or any interest herein or sublet the property or any part thereof, or any right or privilege appurtenant thereto, or suffer any person (the agents and servants of Zuckerman excepted) to occupy the said property or use the same or any portion thereof without the written consent of Anglo first had and obtained. A consent by Anglo to any one such assignment, sub-lease, occupation or use by another person shall not dispense with the necessity of a similar consent to any subsequent assignment, sub-lease, occupation or use. The execution, grant or permission by Zuckerman of any such assignment, sub-lease, occupation or use by another person without such written consent of Anglo shall be void and shall constitute a default hereunder and shall automatically terminate this lease and agreement.

(19) Zuckerman shall have no right or authority to mortgage, pledge, hypothecate or otherwise encumber, sell or otherwise dispose of in any manner any share of the crops growing or to be grown upon the demised premises reserved by Anglo as rental, or any part thereof, and any mortgage or other encumbrance executed by Zuckerman covering his share of crops grown or to be grown on the property shall by its terms specifically be made subject to the terms and provisions of and rights of Anglo under

Exhibit A—(Continued)

this lease and agreement. Title to any portion of the crops herein reserved by Anglo as rental shall at all times remain in Anglo.

(20) Anglo shall not be required to make any alterations, improvements or repairs whatsoever on the premises nor to repair, maintain or assume any responsibility for any levees or the consequences of any levee failure. Zuckerman hereby waives the provisions of Sections 1941 and 1942 of the Civil Code of California. Zuckerman agrees to keep the buildings, ditches, pumps, wells, fences and all other improvements except levees and all fixed equipment and machinery on the property in as good condition as they now are or may become during the term hereof, reasonable wear and tear and damage by fire or the elements excepted, at his own cost and expense. In the event that any of said objects are materially injured or substantially destroyed by fire, flood, or other cause, and such destruction is not the fault of Zuckerman or caused by his failure to perform hereunder, then Zuckerman shall not be required to repair them, but this lease shall not terminate for such reason and Anglo shall be under no obligation to make any such repairs. In this connection Zuckerman expressly waives the provisions of Sections 1932 and 1933 of the California Civil Code. The proceeds of any fire insurance shall be used to rebuild the property insured or shall be applied first to minimum rent and then to the purchase price (if

Exhibit A—(Continued)

any option hereunder has been exercised) at Anglo's election.

(21) Zuckerman shall not commit or suffer to be committed any waste on or of the said property or any crop thereon and he shall not do or suffer to be done any act on or about the said premises which will be a nuisance or which will endanger the said property.

Zuckerman shall in his operation of the property and with respect to all matters arising under this lease and agreement comply with all federal, state and local laws and regulations pertaining thereto. He shall not store anything upon the property or perform any acts thereon which would increase the existing rate of fire or other insurance thereon or suspend or render unenforceable insurance now or hereafter in effect.

(22) Zuckerman shall hold all parties hereto and those claiming through them or any of them, and the property, free and harmless of and from any and all liens, judgments and/or encumbrances created or suffered by him or resulting from any of his acts under this lease and agreement or in connection with the property, and free and harmless of and from any and all liabilities, penalties, losses, damages, costs and expenses, including expenses of litigation and counsel fees, causes of action, claims and/or judgments arising from damages, injury or death to persons or property of any kind, from any cause whatsoever connected with the occupation or operation of

Exhibit A—(Continued)

the property or the performance of the terms hereof by Zuckerman.

(23) Anglo will not be liable for the delivery of any water to the leased premises, and will not be liable for any damages to crop, stock and/or other property resulting from any cause whatsoever, including without limiting the generality of the foregoing damage from breakage of levees, overflow or seepage of or to said land or any part thereof, or any adjacent land, or from failure to drain said land.

(24) Should Zuckerman fail properly to perform any of the terms of this agreement, Anglo may, at its option, perform the same or cause the same to be performed, and the cost of so doing shall be charged against Zuckerman and shall be a lien against his interest in any crops produced, and shall be paid to Anglo on demand, with interest at seven per cent (7%) per annum, whether this lease and agreement shall have terminated by virtue of said default or not.

(25) If Anglo shall prevail in any action or suit brought by it for breach, or to restrain the breach of or to enforce any of the covenants or agreements herein contained on the part of Zuckerman to be paid, kept, or performed, or for the recovery of said property, Zuckerman will pay to Anglo the costs of any such action, including reasonable attorney fees to be fixed by the Court.

(26) Time is specifically made of the essence of this lease and agreement and of every provision hereof. The waiver by Anglo of any failure of Zuck-

Exhibit A—(Continued)

erman to perform any covenant, term or condition hereof shall not constitute a waiver of any subsequent or continuing failure, omission, or refusal on the part of Zuckerman to so perform or a waiver of any other covenant, term or condition hereof.

(27) If Zuckerman or any of his agents or employees hold over and retain possession of the property, or any part thereof, after the expiration of the term of this lease and agreement, or the sooner termination hereof, such holding over shall not be construed to be either a renewal or an extension hereof, and neither Zuckerman nor any of his agents or employees shall be entitled to retain possession of said property for an additional renewal period or for any time whatsoever.

(28) Anglo, its agents, servants and invitees shall at all times have free ingress to and egress from the property, and every part thereof, to see that the terms of this lease and agreement are being fully complied with, to exhibit the said property, and for any other lawful purpose. Anglo shall have the right to enter upon the property at any time for the purpose of constructing or altering any improvements or work thereon that it may consider necessary or advisable and to use such earth, wood, and other material provided from the property as may be desirable in such construction or alteration.

(29) All moneys due, or to become due and payable to Anglo under the terms of this lease, shall be paid to it at its office at San Francisco, California.

Exhibit A—(Continued)

Any written notice herein required or provided to be given to the Lessee shall be deemed given if mailed by registered letter addressed to Zuckerman, at 20 East Weber Street, Stockton, California.

(30) Should Zuckerman violate or neglect or omit to perform any of the terms, covenants, agreements or conditions herein contained on his part to be performed, except provisions regarding payment or delivery of any crop share or other rental or things of value or assignment or subleasing, and such default shall continue for a period of fifteen (15) days after written notice thereof from Anglo to Zuckerman, or if Zuckerman shall fail to pay or deliver the rentals and other payments herein provided for or shall attempt to assign this lease or agreement or transfer or sublease any part of the real or personal property above described contrary to the provisions hereof, or if the said Zuckerman shall file any voluntary petition in bankruptcy, or under the provision of the Federal Bankruptcy Act for the arrangement, composition or extension of any of his debts, or if the said Zuckerman shall be finally adjudicated a bankrupt upon any involuntary petition of any kind under the provisions of the Federal Bankruptcy Act, or if Zuckerman or Mandeville shall hereafter apply to any Federal Court for any relief under any provision of said Bankruptcy Act other than for approval of the composition of which this lease is a part or in connection with objections to claims, or if any attachment or execution shall be levied upon the interest of Zuckerman in any of the

Exhibit A—(Continued)

real or personal property herein described or the crops hereinabove mentioned or if any of them be sequestered or taken by any receiver appointed by any court and the lien of such attachment or execution be not removed or such sequestration or receivership be not terminated within thirty (30) days after its levy or commencement, or if Zuckerman shall make an assignment of any substantial portion of his assets for the benefit of his creditors, then and in any of such events this lease and the options herein granted shall forthwith terminate, without notice, demand or act of any party hereto. In the event of any termination hereof because of Zuckerman's default, Anglo shall have the right immediately to re-enter the said real property, and all sums theretofore paid by Zuckerman to Anglo shall be the sole and separate property of Anglo as compensation for the use and occupancy of said property from the date hereof to the time of such default, and in no event shall this agreement or any interest of Zuckerman in the land or personal property above described be treated as an asset after such termination, except as to such thereof, as to which title has been transferred to Zuckerman. Any and all of the remedies and rights of Anglo under the provisions of this paragraph shall be cumulative and shall be in addition to and in aid of any and all rights and powers available to Anglo by law.

Anglo all of the real and personal property herein described not then paid for in full, together with

Exhibit A—(Continued)

this lease, at any time after December 31, 1941. Upon such surrender Zuckerman shall not be liable for any further performance of this lease and agreement but shall be responsible to Anglo for any damage to the real or personal property due to Zuckerman's negligence while in possession thereof. All payments towards the purchase price of any property so surrendered theretofore made by Zuckerman and all rent on account thereof theretofore paid by Zuckerman shall remain the sole property of Anglo.

(32) As a material part of the consideration for the lease and option herein granted, Zuckerman and Mandeville do hereby jointly and severally fully, finally and completely release Anglo, its successors and assigns of and from all claims, demands and liabilities which the said Zuckerman or Mandeville may have ever had or now has or have against Anglo, whether known or unknown, arising out of any cause whatsoever from the beginning of the world to the present time, and particularly Zuckerman and Mandeville do so release Anglo from all such claims, demands or liabilities arising out of or in connection with the real or personal property hereinabove described or any deed of trust, crop mortgage, chattel mortgage, conditional sale contract, promissory note or other agreement or instrument relating to said real or personal property to which Anglo was or is a party and whether or not the said Zuckerman or Mandeville was or is a party thereto or interested therein, provided, however, nothing contained in this

Exhibit A—(Continued)

paragraph shall be construed as releasing Anglo from any obligations assumed by it under this lease and agreement.

(33) No representations have been made by any party to any other hereunder inducing the making of this contract, and no undertakings have been entered into between any of the parties hereto except those which are specifically set forth in this lease and agreement, and it is understood that this lease and agreement is the entire agreement of the parties with reference to the subject matter hereof. It is understood that neither Crystal nor Pacific nor Stockton shall have any responsibility for the enforcement of the terms of this lease or the performance hereof except as to the specific provisions regarding disbursement of certain funds by Stockton.

(34) The terms of this lease and agreement and the covenants and agreements herein contained shall apply to and shall bind and inure to the benefit of Zuckerman, his heirs, executors, administrators and assigns, should this lease and agreement or any interest therein pass to any of said persons with consent of Anglo as herein provided. The terms of this lease and agreement and the covenants and agreements herein contained shall apply to and shall bind and inure to the benefit of Anglo, its successors and assigns.

Exhibit A—(Continued)

In Witness Whereof, the parties hereto have hereunto subscribed their respective names this....day of...., 1941.

The Anglo California National Bank
of San Francisco

By.....

By.....

“Anglo”

.....

“Zuckerman”

Mandeville Island Farms, Inc.

By.....

“Mandeville” President

American Crystal Sugar Company

By.....

“Crystal”

Pacific Guano Company

By.....

By.....

“Pacific”

Stockton Savings and Loan Bank

By.....

By.....

“Stockton”

Exhibit “A” to Lease and Agreement

Two (2) Self propelled, 3 row potato diggers

Two (2) Potato washers and graders

One (1) Onion sorter and grader

Four (4) Frigidaire electric refrigerators, located one each at Camp
29, Camp 23, Camp 21 and Camp 1

Exhibit A—(Continued)

- Two (2) Servel electric refrigerators, located one each at Camp 13, and Camp 7
- Four (4) Large six foot kitchen ranges, with double ovens, flat top rebuilt, located one each at Camps 13, 23, 29 and 21
- One (1) 1,000 gallon tank
- Two (2) 2,000 gallon tanks
- One (1) Ingle two oven range, fire box at left 8'x2'5", manufactured by W. S. Ray Company, reconditioned.
- One (1) Ray standard range No. 222, two ovens, center fire box, 6'x28 1/2", reconditioned.

KITCHEN UTENSILS

- | | |
|--------------------------------------|-----------------------------------|
| 81 Large Soup Plates Heavy Porcelain | 4 Aluminum Syrup Pitchers |
| 158 Dinner Plates | 10 Small Bread Pans |
| 65 Cake Plates 90 Saucers | 18 Long Square Bread Pans |
| 51 Small soup plates | 2 Large Gravy Strainers |
| 69 Porcelain Cups (assorted) | 1 Large Meat Saw |
| 6 New dish pans | 4 Meat Grinders |
| 76 Porcelain platters | 37 Asst. Agate Platters |
| 28 Agate Saucers | 54 Agate Dinner Plates |
| 2 Olive Dishes | 18 Asst. Agate Square Pans |
| 141 Silver Knives | 18 Muffin Pans (12 holes) |
| 99 Silver Forks | 80 Tin Pie Plates |
| 62 Silver Tea Spoons | 6 Napkin holders |
| 152 Silver Soup Spoons | 5 Agate Bowls Large |
| 1 Two Gal. Crock | 4 Large Coffee Pots |
| 3 One Gal. Crock | 6 Dish Pans |
| 1 One-half Gal. Crock | 2 Agate Dish Pans three gal. each |
| 36 Asst. Agate Pitchers | 13 Bake Pans |
| 27 Agate Coffee Pots | 9 Flat Bake Pans |
| 13 Sugar Bowls | 7 Ladle Strainers |
| 6 Horse Radish Jars | 33 Ladles |
| 7 Syrup Jars | 7 Large Spoons |
| 32 Oil & Vinegar Jars | 1 Coffee Urn (copper) |
| 1 Orange Squeezer | 6 Potato Mashers |
| 46 Salt & Pepper Shakers | 5 Large Batter Beaters |
| 23 Deep Oblong Bowls | 2 Egg Beaters |
| 10 Mustard Bowls | 3 Water Dippers |
| 5 Large Mixing Bowls | 2 Strainers |
| 19 Aluminum Pitchers | 4 Cheese Graters |

Exhibit A—(Continued)

KITCHEN UTENSILS—(Continued)

1 Flour Sifter	1 Large Fork
1 Quart Measure	2 Large Dish Pans
21 Iron Knives	2 Soap Dishes
13 Iron Forks	2 Colander & Two large strainers
1 Dish Dryer	3 Agate Bowls—small
7 Frying pans	1 Wooden Mixing Bowl
4 Two Gal. Agate Pots	3 Rolling Pins
1 One Gal. Agate Pot	12 Meat Hooks
2 Agate Sauce Pans	5 Buckets
1 Aluminum Square Pan	3 Metal Drinking Cups
1 Oval Agate Dish Pan	2 Scales (1 balance, 1 beam)
1 Mop Wringer	6 Cruets
7 Dish Pans	1 Square Aluminum Cake Pan
9 Wash Basins	1 Spray Gun
5 Rd Iron Dough Mixing Bowls	1 Pump for 5 Gal. Can
4 Potato Peelers	2 Butcher Knives
2 Flour Scoops	1 Small Frying Pan
2 Cookie Cutters	
1 Flapjack Turner	

ALUMINUM STOCK POTS

1 Five Quart Pot	1 Two Gallon Pot—no faucet
2 15 Gallon Pot with Faucet	1 5 Gallon Pot—no faucet
1 5 Gallon Pot with Faucet	1 10 Gallon Pot—no faucet
1 15 Gallon Pot	

IRON STOCK POTS

1 15 Gallon Pot	1 10 Gallon Pot No Faucet
1 10 Gallon Pot with Faucet	1 Three Gallon with long handle
1 5 Gallon Pot no Faucet	1 Two Gallon with long handle
1 10 Gallon Pot no Faucet	5 One Gallon with long handle
6 Two Gallon Pots no Faucet	2 3½ Gallon Fire Extinguishers
2 5 Gallon Pot no Faucet	
1 Three Gallon Pot no Faucet	

ADDITIONAL MISCELLANEOUS PROPERTY

1 2 Quart Measure
11 Small Cereal Bowls (agate)
34 Cereal Bowls

Exhibit A—(Continued)

ADDITIONAL MISCELLANEOUS PROPERTY—(Continued)

Three Hundred Fifteen

- (315) Cots Manufactured by Simmons Company, steel angle frame, Link Iron Spring, length 72"x36", tubular pipe ends, to fold flat under the spring. Grey enamel finish.

One

- (1) Eight row onion seeder, seeder units spaced 14" apart. Power driven from main axle.

Seven

- (7) Land Floats (Four 12'x30'.
Three 10'x30')

One

- (1) 2 wheel disc cart

One

- (1) 2 wheel disc cart with grain seeder attached.

One

- (1) Welding Outfit, as follows:

- 1 Used 1934 Chevrolet Motor No. 14550210
- 1 New Roe Generator No. 200829—200 Amp.
- 1 Frame Complete
- 1 Canopy complete
- 1 Gas Tank 4 Side Panels I Lourve
- 1 Gas Filter 1 Tilletson Carburetor
- 1 Coil complete with plate to fasten to motor
- 1 Radiator Gas line & Fittings 3'1/2" copper tubing starter switch for starter
- 1 Relay for generator
- 2 Battery Cables, Distributor Head Rotor & Spark Plug wires.
14" 11/2" Hose, 1-11/2" Hose Clamp, 8 Hose clamps
- 1 Starter Lever assembly
- 1 Brass petcock and street elbow
- 1 Ford V-8 Fan special Mount.
- 1 Fan Belt, 30' Copper tubing
- 1 Pierce Governor
- 2 No. 554 V Pulley. No. 230 V Belt.
- 2 Ball Joints
- 1 Bayonet Gauge
- 1 Ford Switch Assembly
- 1 Ammeter
- 1 Loom
- 1 Muffler with flange
- 1 Carburetor adapter

Exhibit A—(Continued)

ADDITIONAL MISCELLANEOUS PROPERTY—(Continued)

- 1 Complete Thermoid Assembly coupling
- 1 Eye bolt for life No. 28 Vulcan.
- 1 XL Battery
- 1 Two Wheel Trailer on 7.00x16 Tires. 100' cable
- 1 Holder
- 1 Ground Plate

Three

- (3) Common Sense Wagons $3\frac{1}{4}$ x10 & 6x $\frac{1}{2}$ " tires.
Stribley Level

Two

- (2) Stribley Wingplows No. 34 and No. 35
Stribley Celery Banker No. 26

Two

- (2) Stribley Celery Cutters No. 194 and No. 195

Three

- (3) Stribley Celery Crowders No. 198, 199 and 200
Stribley Celery Disc No. 267
Stribley Celery Seeder No. 145

Three

- (3) Stribley Celery Cultivators No. 567, 568 and 569
Stribley Wheel Hoe No. 229
4-HP Cushman Gas Engine Pump & Hose Complete 2 cyl.
2" centrif.
Cook House Equipment complete consisting of: oil stove,
wood stove & pipe, lamps, dishes, coffee boiler, utensils,
knives, oil cloth, etc., table, benches.
Small tools complete consisting of: 12 hoes, 16 shovels, 6
axes, 4 rakes and any small miscellaneous equipment.

Two

- (2) 4000 gal. tanks for gasoline storage, 9'6" in diameter, 8'
high Bottom run 16 Gauge Upper runs 18 Gauge Pitched
top riveted and soldered Manhole with cover 2" outlet—
2" above bottom; 2" drain outlet on bottom.

One

- (1) Bay City latest model 25 $\frac{1}{2}$ yd. dragline with 14" drop
forged heat treated crawler treads, also with 30' dragline
boom in two halves and equipped with International 6
cylinder Model PA 40 gasoline engine; also with extra
long crawler axles to make the crawlers 2' wider than
standard or 9'8" over all; also including kerosene burner

Exhibit A—(Continued)

ADDITIONAL MISCELLANEOUS PROPERTY—(Continued)

equipment on engine Serial No. Dragline No. 2074.
Serial No. gasoline engine PKE 1553.

One

- (1) 1-2 yd. bucket

One

- (1) Set crawler grouser

One

- (1) Piledriving hammer

Eight

- (8) 8½ No. 9B Disc Harrows 22" Heavy Discs and with scrapers.

Two

- (2) No. 3 End Gate seeders.

Two

- (2) 30 Spike tooth harrows with draw bars.

Eight

- (8) TD 35 Diesel Tractors Wide Tread. Air cleaners, wide track 22" and lighting system with battery

One

- (1) TD 40 Diesel Tractor

Two

- (2) 4,000 gallon gasoline storage tanks.

One

- (1) 8 ft. Galion Grader

One

- (1) Used Model RD-4 Caterpillar Diesel Tractor, 60" Gauge, with 16" heat treated Grouser track shoes. Tractor Serial No. 4G-2486-W.

One

- (1) Potato washing machine with inbound conveyor, sorting table, 7½ H.P. motor, 10 H.P. Motor and pump, 4 switch boxes and pipes.

One

- (1) Onion Grader. Conveyor Table with motor. Serial No. 535

Two

- (2) 5 Gang Light all-around Timkin-equipped Davis Disc Plows, 4 units with 38" discs, wheel bands and scrapers.

One

- (1) 8' Galion Grader with 4 Ft. ext. blade & wire wheels. Serial No. 787.

Exhibit A—(Continued)

ADDITIONAL MISCELLANEOUS PROPERTY—(Continued)

Twelve Hundred

(1200) Feet 24" Pipe.

Thirty-five

(35) Water Syphons

Ten

- (10) 1½ Ton Chevrolet Trucks with Flat Rack Bodies, hinged sides 2 ft. high and removable tail board, bearing the following Manufacturer's Serial No. and Motor No.

Manufacturer's Serial No.	Motor No.
6TD12-2124	T1521385
6TD12-2125	T1521443
6TD12-2126	T1521432
6TD12-2127	T1521442
6TD12-2132	T1521434
6TD12-2134	T1521416
6TD12-2135	T1521492
6TD12-2137	T1521452
6TD12-2138	T1521423
6VD07-6194	T2624127

Seven

- (7) 1-2 Ton Chevrolet Pickups, bearing the following Manufacturer's Serial No. and Motor No.

Manufacturer's Serial No.	Motor No.
6HC12-3411	K1530433
6HC12-3270	K1510635
6HC12-3260	K1510651
6HC12-3268	K1510604
6HC12-3258	K1510602
6HC12-2351	K1447659
6HC12-2358	K1447642

One

- (1) Chevrolet Sedan—1933—Manufacturer's Serial No. 6CA07 24989 and Motor No. 3742152

Two

- (2) Chevrolet Sedans—1939:

Manufacturer's Serial No.	Motor No.
6JA12- 9780	2112432
6JA01-16483	2231977

Exhibit A—(Continued)

ADDITIONAL MISCELLANEOUS PROPERTY—(Continued)

One

- (1) 16' outboard Motor Boat
- Pumps & Syphons
- Fuel Storage Equipment

One

- (1) Ford Pickup

One

- (1) Ford Dump Truck

Seven

- (7) Standard Twin Tractors

One

- (1) Model W Cletrac—used

One

- (1) Automatic Water Pump

Two

- (2) Bolen Tractors—used

One

- (1) Trexler Seed Cutter

One

- (1) Lime Spreader

One

- (1) Hay Rake

One

- (1) 4 Bar Side Delivery Rake

One

- (1) Be Ge Scraper

One

- (1) 4' Scraper—used

One

- (1) Power Saw

Two

- (2) Centrifugal Pumps—used

Two

- (2) Subsoilers

One

- (1) Grain Header—rebuilt

One

- (1) Grain Cleaner—used

Exhibit A—(Continued)

ADDITIONAL MISCELLANEOUS PROPERTY—(Continued)

Six	(6) 8' Disc Harrows
Two	(2) Breneis 8' Disc Harrows
One	(1) Onion Seeder Fertilizer Attachment
One	(1) Well Driller Planet Jr. & Wheel Attachment
One	(1) Allis Chalmers Cultivator
One	(1) Road Sprinkler
Sixteen	(16) Platform Scales
Eighteen	(18) Hand Trucks
Eighty-four	(84) Steel Cots
Sixty	(60) Steel Cots
One	(1) Air Compressor & Welder—used Miscellaneous Shop Equipment
One	(1) Walk-In Ice Box at Camp 29 Butcher Shop
Two	(2) Montague Ranges
One	(1) Beet Spinner
Two	(2) Cultivators for Beets
Eight	(8) Beet Cultivators (Amer. Cryst.)
One	(1) Beet Cultivator Attachment

The Court: Proceed.

Mr. Arndt: Mr. Zuckerman.

ROSCOE C. ZUCKERMAN,

called as a witness by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Roscoe C. Zuckerman.

Direct Examination

By Mr. Arndt:

Q. What is your name?

A. Roscoe C. Zuckerman.

Q. Where do you reside, Mr. Zuckerman?

A. Stockton, California.

Q. What is your occupation? A. Farmer.

Q. What is known as the Delta region of California?

A. The Delta region of California is an area between the City of Stockton and Sacramento, Antioch and Tracy, roughly, comprising several hundred thousand acres.

Q. How long have you been engaged in farming activities in the Delta region of California?

A. 33 years.

Q. Now, with what agricultural crops have you personally had experience?

The Court: Are we interested in anything other than [273] beets? Let us get down to beets, sugar beets.

Q. (By Mr. Arndt): What has been your experi-

(Testimony of Roscoe C. Zuckerman.)

ence with the raising of sugar beets in the Delta region in California?

A. I have grown sugar beets in the Delta since about 1924.

Q. In what acreages in general?

A. I have grown as high as 1,600 acres and as small as 50 acres.

Q. Now, what was your connection with Mandeville Island Farms, Inc., one of the plaintiffs in this action, in 1938 and 1939?

A. I was a stockholder and president of the company.

Q. Prior to being connected with the Mandeville Island Farms, Inc., were you connected with any other farming organizations involving sugar beets?

A. Yes, sir.

Q. And if so, in what capacity?

A. I was——

The Court: Is there any question as to this man's experience in raising sugar beets?

Mr. Works: None by us, your Honor.

Mr. Arndt: All right. [274]

Q. (By Mr. Arndt): Now, will you describe the process involved in the growing of sugar beets, including preparation of the land, planting of the seed, cultivating, thinning and harvesting and shipping?

A. The land is first plowed, disked, some times leveled, good seed bed made, beets are planted, ditches are dug for irrigation, beets are cultivated, weeded, thinned, cultivated some more, thinned some

(Testimony of Roscoe C. Zuckerman.)

more, irrigated, and that is about the process up to harvesting.

Q. What, in general, is the process of harvesting?

A. There are machinery, machines that are used to harvest beets, and beets are also harvested by hand. Before the beets are harvested, they are lifted. In the hand method, they are taken out of the ground by the toppers, the tops are cut off, and they are put in wind rows, and later loaded into vehicles to haul them to the dumps.

Q. With reference to Mandeville Island, is that an actual island? A. Yes.

Q. Where is it located with reference to Stockton?

A. It is located about 22 miles northwesterly from Stockton.

Q. Now, when did Mandeville Island——

The Court: Is it a complete island?

The Witness: Yes, sir. [275]

Q. (By Mr. Arndt): When did Mandeville Island Farms, Inc., first acquire Mandeville Island?

A. In about November 1937.

Q. From whom did it acquire it?

A. The Empire Farms Company.

Q. Was there any sugar dump on Mandeville Island at the time that Mandeville Island Farms, Inc., acquired the property? A. Yes.

Q. What is meant by a sugar dump?

A. Sugar dump is where the beets are hauled from the field to the dump, laid on the dump, loaded onto barges.

(Testimony of Roscoe C. Zuckerman.)

The Court: In other words, sugar beets had been raised there before you acquired the property?

The Witness: Yes, sir.

Q. (By Mr. Arndt): Before you acquired the property, to whom were the sugar beets sold that were raised on the tract?

A. To the American Crystal Sugar Company.

Q. To whom did this dump belong?

A. To the American Crystal Sugar Company.

Q. Was there any other dump on the island?

A. No.

The Court: In other words, that was the only outlet for your beets? [276]

The Witness: Yes, your Honor.

Mr. Arndt: Did you enter into a contract with the American Crystal Sugar Company for the crop year 1938?

A. Yes.

Q. And that was for Mandeville Island Farms, Inc., I assume? A. Yes.

The Court: And then the flood came?

The Witness: Yes.

Q. (By Mr. Arndt): When did that flood come?

A. It came on Sunday, February 13, 1938. I can remember that.

The Court: I should imagine so. As a matter of curiosity, do you keep raising beets year after year on the same soil?

The Witness: Generally not, although I have raised beets on the same land for six consecutive years.

(Testimony of Roscoe C. Zuckerman.)

The Court: Do you use any fertilizer?

The Witness: Yes, we use fertilizer.

The Court: When you rotate, what do you rotate with?

The Witness: Potatoes, onions, barley, and such crops as that.

Q. (By Mr. Arndt): What was the effect of the flood on the 1938 beet sugar crop?

A. All that were planted at the time of the flood were [277] covered with 12 feet of water.

Q. Were any beets raised in the 1938 crop?

A. No.

Q. Did Mandeville Island Farms, Inc., owe Crystal any money after the flood? A. Yes.

Q. At the time you entered into the 1938 contract with Crystal, did you give any crop or chattel mortgage to Crystal?

The Court: Counsel, you have introduced them in evidence here.

Mr. Arndt: All right.

The Court: Can't we get down to the circumstances under which these various contracts were executed, so as to give the court a little background into the whys and wherefores, particularly as to the change in form?

Mr. Arndt: All right.

Q. Explain in general the circumstances under which the 1938 contract was signed.

A. Will you please pardon me? I wasn't listening.

(Testimony of Roscoe C. Zuckerman.)

Q. Explain the circumstances in general as to how the 1938 contract was signed.

The Court: That contract is not in dispute, is it?

Mr. Arndt: That is correct.

The Court: Let's find out what occurred when the change [278] in the form of contract was made. From the growers' point of view, it must have been presented to them in some manner. Let's find out what that was. That is where I am looking for some light.

Q. (By Mr. Arndt): Did you attend any meeting with Mr. Zitkowski or anyone else connected with American Crystal with any growers at which there was any discussion, any intimation of a change that was contemplated from the 1938 form of single return of Clarksburg to the joint return?

A. No, I did not.

The Court: You don't know anything about why there was a different contract?

The Witness: No, I do not.

The Court: And you never made any inquiry?

The Witness: It never at that time made any impression upon me.

The Court: As far as your knowledge is concerned, one year you signed one contract and the next year you signed a different contract, and there was no discussion about the change?

The Witness: There was not at the time that I signed the contract.

The Court: May I ask you this: You did sign the contract on behalf of your company, didn't you?

(Testimony of Roscoe C. Zuckerman.)

The Witness: Yes, your Honor. [279]

The Court: Was that contract presented to your board of directors?

The Witness: No.

The Court: You just simply went ahead in your capacity——

The Witness: I was president of the company and transacted the business for the company and signed the contract.

The Court: When did you first discover that there was a different arrangement for payment?

The Witness: I think it was along about 1940.

The Court: Up to that time had your relations with the Crystal people been on friendly terms?

The Witness: I would say fairly friendly.

The Court: When you executed this contract, the first contract that made a change in the terms, was there any—to put it in the way of a leading question—any compulsion of any kind, rather than signing any other contract?

The Witness: Well, I don't know.

The Court: You were a free agent, weren't you? Let's put it that way.

The Witness: No, I don't think I was a free agent at that meeting. At the time of the flood I owed Crystal \$26,000 and I went through a very, very serious difficult time to reclaim that land back from death. [280]

The Court: But there was no pressure on you in one way or another, was there?

The Witness: Not particular pressure. I got it

(Testimony of Roscoe C. Zuckerman.)

done and I was ready to plant the crop in 1939 and I accepted the contract for about 1,000 acres of sugar beets.

The Court: May I ask you another question? If there is no objection, I would like to ask some more questions along the line I am interested in.

Mr. Arndt: I would much rather have your Honor ask the questions, then, and that would save a lot of time. [281]

The Court: When did you first have any discussion with the Crystal people about the method of payment, figuring the price of sugar beets on an average rather than on the Clarksburg plan?

The Witness: I have been trying to bring that back into my senses and I was trying to figure out exactly when it happened.

During the payments that were coming to me in 1939 my business, and practically all of it that was handled between Crystal and myself was done with Mr. Holmes, who was their general manager.

Along in the spring of 1940—Mr. Holmes said:

“Well, now, there is going to be some additional payments coming.”

Those payments never materialized and I could see that I wasn't going to pay out the money that I had gotten from Crystal and that the sale of beets wouldn't amount to the amount of money that I owed them. And at one period there I had figured and discussed with him that I would get about \$15,000 additional payment.

If I had gotten that \$15,000 additional payment,

(Testimony of Roscoe C. Zuckerman.)

by the coat sleeve manipulation, I figured I would be about even with them on the 1939 advances for beets. When it didn't materialize I knew that I was going to be short.

I think there was one day that Mr. Holmes had come to [282] visit me on the ranch that I brought up this situation and discussed it with him and if I have any memory whatsoever about any objections it was at that time, in the spring or early summer of 1940.

The Court: And what did you say to him at that time?

The Witness: I said it looked to me like, and these may not be the exact words, that I am not doing as well in 1939 as the Crystal growers did in 1938.

The Court: Did he make any comment?

The Witness: Mr. Holmes?

The Court: Yes.

The Witness: Not that made any impression upon me.

The Court: You said you have been a farmer for how long?

The Witness: 33 years.

The Court: And you never get what you anticipate, do you?

The Witness: Sometimes but mostly it is the other way, but we do sometimes have good years.

The Court: The only thing I have to say is the farmer is an optimist.

The Witness: He has to be an optimist to be a

(Testimony of Roscoe C. Zuckerman.)

farmer. He has to be an optimist at least to be a beet farmer.

The Court: You ought to try an orange grove.

The Witness: Maybe they are worse.

The Court: You simply complained that you weren't getting [283] as much out of your beets as you had gotten previously.

The Witness: That is right.

The Court: And then you went on to another year.

The Witness: I did.

The Court: And another contract.

The Witness: Yes.

The Court: Did you have any discussions with them on the second contract?

The Witness: No.

The Court: Or the third one?

The Witness: No. I was still in the hole and I was still struggling to get out. I was struggling to pay off.

The Court: When did you quit raising beets?

The Witness: I stopped raising beets for Crystal in 19—at the end of 1944 crop.

The Court: You continued to raise beets up until that time?

The Witness: Yes.

The Court: Are you still raising them?

The Witness: I had a few beets in 1945, about 50 acres. This ranch is 5,000 acres. I had a few beets in 1946 and a few in 1947 and a few in 1948 and none in 1949 and none in 1950.

(Testimony of Roscoe C. Zuckerman.)

The Court: And during the time that these contracts were in existence, during the time you were working under [284] those years you are complaining about——

The Witness: 1939 to 1941.

The Court: You hadn't discussed with Mr. Holmes or anybody else at Crystal as to why they had changed their method of payment?

The Witness: No, except as I said this one time.

The Court: That you hadn't gotten as much out of them as you got in 1938?

The Witness: Yes, that is right.

The Court: But that wasn't a complaint as to the method of figuring but the fact that you just weren't getting that much money?

The Witness: I knew then that the scale of pay of the 1938 crop was Crystal's rate of pay which was higher than the Holly and Spreckels and we had some conversation at that time about that and that was early in 1940.

The Court: That is all, proceed.

Q. (By Mr. Arndt): Now, during what years did Mandeville—what crop years did Mandeville Island Farms Inc., farm the property?

A. 1939 and 1940 and part of 1941.

Q. And then in 1941 came the section 75 proceedings of Mandeville followed by the Anglo Bank taking back the property under the composition agreement with the lease to you individually? [285]

A. Yes.

(Testimony of Roscoe C. Zuckerman.)

Q. And then for the year 1941 and subsequent years you farmed the property yourself?

A. Yes.

The Court: You say Mandeville went under 75?

Mr. Arndt: Yes. That is in the stipulation we have here. Mandeville went in the 75 in 1941 and under the composition agreement, which is part of this stipulation, the property went back to the Anglo-London-Paris National Bank which had the first mortgage on it who, in turn, made a lease to Roscoe Zuckerman which was joined into by Crystal and other preferred creditors.

The Court: What is the status of Mandeville Farms now, or when this suit was commenced?

Mr. Arndt: The status is perfectly all right. In other words, it has been released of its obligations. The obligations have been taken over under this compromise. All the preferred creditors were paid either by the property or Roscoe Zuckerman. They have been paid off.

The Court: How about the creditors that weren't preferred?

Mr. Arndt: The unsecured creditors?

The Court: Yes.

Mr. Arndt: Well, I had better ask Mr. Zuckerman about that. He can tell us better. [286]

The Court: The record will show that, counsel. The only thing is I was wondering if we might find ourselves in a position where the plaintiffs are not the real parties in interest.

(Testimony of Roscoe C. Zuckerman.)

Mr. Arndt: I am not worried about that. They are the real parties in interest.

The Court: So far as you are concerned the record is clear?

Mr. Arndt: That is right.

The Court: You may proceed. I am not looking for trouble.

Q. (By Mr. Arndt): Now, what type of machinery and equipment and apparatus was used during these years in connection with the growing of sugar beets?

The Court: What materiality is that, counsel?

Mr. Arndt: I just wanted to bring out that the equipment was all chattel mortgaged to Crystal.

The Court: And you have the record here of the chattel mortgages. I assume when they were wiped out they were indebted to Crystal until the chattel mortgage was satisfied?

Mr. Arndt: Yes. It was what you might call economic duress but if that is understood——

The Court: I don't know whether it is that or simply giving a man a chance to work out of his debt. There are two ways of looking at it when you carry a man who is in debt [287] to you—whether it is economic pressure or whether you are a good fellow by carrying him.

Mr. Arndt: I was just referring to the fact that he couldn't deal with any other sugar company while sugar company No. 1 had a crop mortgage on the land which continued until it was paid off as this mortgage shows.

(Testimony of Roscoe C. Zuckerman.)

The Court: May I ask this question? Was there any other sugar company that you could have dealt with from an economic point of view?

The Witness: That I could?

The Court: Yes.

The Witness: Yes.

The Court: Which one?

The Witness: I could have dealt with Holly or Spreckels, either one, and in that regard I at different times inquired whether they would purchase beets from me. I could never make an agreement with them.

The Court: In other words, in order to make an agreement with them you had to pay off Crystal?

The Witness: I had to get Crystal's indebtedness off of the record.

The Court: They had been carrying you and they carried you through the storm?

The Witness: Yes.

Q. (By Mr. Arndt): That is all the questions I have at [288] this time.

The Court: Cross examination.

Cross Examination

By Mr. Works:

Q. Mr. Zuckerman, when did you first find out that the crop contracts for 1939, 1940 and 1941 were predicated upon a joint net price determination factor?

A. As I told the court, I can't tell you exactly when that was but it was at an early period in 1940, to the best of my memory.

(Testimony of Roscoe C. Zuckerman.)

Q. Are you referring now to this conversation with Mr. Holmes? A. Yes, sir.

Q. In which you discussed the fact that the nets had been higher in 1938? A. Yes.

Q. What did he say to you in that conversation which informed you that settlements were then being made—I mean in 1939, '40 and '41, upon a joint net basis instead of a single net basis?

Mr. Arndt: Just a moment. At that time settlements were not being made for 1940 and 1941, I think it was '39.

Mr. Works: I think the witness understands.

Q. (By Mr. Works): What did he say in that conversation to indicate to you that there had been a change in the method [289] of determining the net return to the grower?

A. I can't tell you exactly what he said or what was said by either of us, but I think—I have this memory of an understanding that there was to be a joint return and that I would get paid the same as all of the beet growers in the district, whether they grew for Holly or whether they grew for Spreckels or whether they grew for Crystal.

Q. Can you tell us the substance of what he said which conveyed that information to you?

A. That would be, other than what I have just said, that it would—we would get the same price for our beets that all of the growers in the district obtained for the same kind of beets.

Q. Where did this conversation take place with Mr. Holmes?

(Testimony of Roscoe C. Zuckerman.)

A. The one that I am talking about, on Mandeville Island.

Q. At your place? A. Yes.

Q. Where did you sign the 1939 American Crystal contract?

A. I think I signed it in my office.

Q. Where did you sign the 1940 contract?

A. I would say in the same place, in my office.

Q. At the time you signed the 1940 contract, you knew that settlement was to be based on a joint net, an average net, as to the returns of all three companies, didn't you? A. Yes.

Q. Where did you sign the 1941 contract?

Mr. Arndt: Counsel, there are two 1941s. You mean the first one, which was Mandeville, or the second one, which was Sugarman?

Q. (By Mr. Works): Give me the information as to each one, please.

A. Well, I can't state with absolute accuracy where I signed the 1941 contracts. It could have been in my office, it could have been in Holmes' office, it could have been in the attorney's office, Crystal's attorneys. That is about the only places that I could have signed them.

The Court: But you signed it, anyway?

The Witness: I signed it.

Q. (By Mr. Works): I gather you live on an island, but you have neighbors, don't you?

A. Would you pardon me, but I did not hear that?

(Testimony of Roscoe C. Zuckerman.)

Q. Do you have neighbors adjacent to your location on Mandeville? A. On land?

Q. Neighbors. [291]

A. Yes. There are no neighbors on Mandeville Island.

Q. I understand. You are in sort of an agricultural community where a lot of beet growers live, aren't you?

A. Well, there are beets grown on other land adjacent to Mandeville.

Q. Did you talk to any other beet growers prior to the time you signed the 1939 contract with reference to any contemplated change in the form of the American Crystal and Holly and Spreckels contracts? A. No, I did not.

Q. Did you not know that there had been a meeting at Sacramento some time prior to the time when those contracts were put out, at which a committee of growers met with representatives of the three companies and discussed this joint net?

A. No, I didn't.

Q. Did you not tell Lester Holmes prior to the time when you signed the 1939 contract that you didn't like this joint net, because you felt you could make more money on a single net basis?

A. Not that I can remember.

Q. Would you say that you didn't make such a statement, either in substance or in effect?

A. I can't say that I can remember making such a [292] statement.

(Testimony of Roscoe C. Zuckerman.)

Q. During 1938, 1939, 1940 and 1941, you saw a good deal of Lester Holmes, didn't you?

A. I did not see him much in 1938 while the island was being de-watered. I saw him quite a lot during the year 1939.

Q. You say your relationships with the Crystal people were fairly friendly?

A. I would regard them so, yes.

Q. Didn't you address Mr. Holmes in your letters to him as Lester and didn't you sign your letters to him and to Mr. Wilds as Roscoe?

A. I could have.

Q. Your relations with them were very friendly, were they not, Mr. Zuckerman?

A. Well, I would say that they were a reasonable friendly business relationship.

Q. Didn't they carry you and your activities from the fall of 1937 on to after 1942, year after year?

A. I owed them money and they loaned me money, but we had our differences, business differences.

Q. And weren't you continually importuning them for money to keep you in, not only the sugar beet business, but in raising other crops?

A. I asked them to loan me money to raise crops other [293] than sugar beets.

Q. Didn't you know at all times during 1939, 1940 and 1941 that sugar beets delivered to Clarksburg were being shipped to Oxnard and had been prior to 1939?

(Testimony of Roscoe C. Zuckerman.)

A. The first knowledge that I had was when my beets went to Oxnard in 1939.

Q. In 1939? A. Yes.

Q. And how did you find that out?

A. By seeing them, knowing that the barges were not going to Clarksburg, that arrangements were made in Stockton to transfer them.

Q. Did you talk to Lester Holmes about that situation? A. I probably did.

Q. Did you make any complaint to him about it or not? A. No.

Q. You don't recall whether you spoke to him or not?

A. Well, the probability is that I did speak to him about it.

Q. And the probabilities are that he told you that that was customary practice and had been, isn't that right?

A. I wouldn't answer that as yes.

Q. This Mandeville Island Farm Company, you, I understand, were the president and also a stockholder. What proportion [294] of the stock did you hold? A. Half at that time.

Q. There was no control? A. No.

Q. To whom did you sell your sugar beets after 1944? A. The Holly Sugar Company.

Q. And that was the situation during each of those other later years that you mentioned?

A. Yes.

Q. Have you ever sold to Spreckels?

A. Yes.

(Testimony of Roscoe C. Zuckerman.)

Q. When?

A. Not from Mandeville, but from another farm.

Q. You have done business with all three of these companies, is that correct? A. Yes.

Q. Now, your first contractual relationship with American Crystal commenced with this 1938 crop season, did it not?

A. Yes. Contractual.

Q. That is what I mean. And you executed a 1938 crop year contract—let me withdraw that, if I may.

On or about December 2, 1937, do you recall signing a crop year contract with American Crystal?

A. Yes, I can remember of having signed a contract [295] with Crystal.

Q. Which crop year would that have covered, signed in December of 1937?

A. The 1938 crop year.

Q. That would be the 1938?

A. We call it 1938-'39.

Q. Yes. The crop year of 1938 would commence on August 1, 1938, I believe? A. No.

Q. No? Tell me when.

A. Generally, the 1938 contract would start when the beets were planted in 1938, but we didn't finally get paid for those beets until the following August.

Q. I understand. At the time you signed that contract, you didn't owe the American Crystal Sugar Company a nickel, did you?

A. Which contract?

Q. The contract you signed on December 2, 1937.

(Testimony of Roscoe C. Zuckerman.)

A. No, I did not. I might have, but—I might have gotten advances prior to the signing of the contract, but I would have to refer to the books. It could have been a few weeks ahead that I did get the money, and it might have been a few weeks afterwards.

Q. It wouldn't have amounted to very much, anyway, would it, at that time? [296]

A. It might have amounted to \$10,000.

The Court: Whatever it was, it was advanced in contemplation of the execution of the contract?

The Witness: That is right.

The Court: So it is part of the same transaction?

The Witness: Yes.

Mr. Works: May I approach the witness and show him this document, your Honor?

The Court: Yes, certainly.

Q. (By Mr. Works): I show you a letter on Mandeville Island Farms, Inc., letterhead, dated December 2, 1937, and ask you to state if that is your signature.

A. No, that is not my signature.

Q. Who wrote it for you?

A. It looks like T—Miss Taylor, my secretary.

Q. Miss G. P. Taylor?

A. Yes, Gladys Taylor.

Q. The letter was dictated by you, however?

A. Yes.

The Court: It is your letter?

The Witness: Yes. May I read it?

Mr. Works: Surely.

(Testimony of Roscoe C. Zuckerman.)

Q. (By Mr. Works): You were referring to this crop year contract we have been talking about for 1938? A. Yes. [297]

Q. You say here, "This contract is being signed and forwarded to you"—that is to Lester Holmes, "Dear Lester."—"In addition to the above—" referring to the beet contract—"on the basis and arrangement that American Crystal will loan to Mandeville Island Farms \$125,000 as shown by the budget which you already have. Without the loan of the money, we could not grow the beets, so it is with that understanding concerning erecting of the beet dump and the loan of the money that I am signing this agreement and forwarding it to you."

That is a fact, is it not, that unless they had made you a substantial advance, you couldn't have grown any beets at all that year, and you wouldn't have?

A. That is correct.

Q. Isn't that fact also true as to 1939, 1940, 1941 and 1942, you wouldn't have grown a single beet unless the American Crystal Sugar Company——

The Court: Of what materiality is that, counsel?

The Witness: I can answer that.

The Court: Wait a minute. I am just asking counsel.

Mr. Works: Your Honor, it indicates this, I think: There is a claim of economic duress, and we propose to show by a sheaf of correspondence that all of the pressure was the other way, that this almost approached a joint venture as between the com-

(Testimony of Roscoe C. Zuckerman.)

pany and Mr. Zuckerman and this is the opening gun. He either owed them nothing at all or very little, and [298] at that time he insisted on their financing him.

The Court: Out in my country, it is called grubstaking.

Mr. Works: I don't object to the use of that term, either, your Honor, but I do want to show the relationship there between these parties. I am not going to comment upon these letters. I am going to have them identified and introduced, and then your Honor can study them.

Mr. Arndt: I have already offered to stipulate, counsel, to the whole sheaf of letters you gave me. You don't have to show them to the witness. I am willing to stipulate to them.

The Court: But after you stipulate to them and get them in the record, I am going to have to study them.

Mr. Arndt: And then I am going to file another bunch, the replies, and the rest of the letters.

The Court: The point I am making is this: It is probably to the advantage of both parties. You wanted the beets?

Mr. Works: **Exactly.**

The Court: And they wanted to raise them for profit.

Mr. Works: **Exactly.**

The Court: You are not claiming that it was a joint venture?

Mr. Works: No.

(Testimony of Roscoe C. Zuckerman.)

The Court : A legal joint venture. [299]

Mr. Works: No, not in the technical sense.

The Court: You avoid any responsibility by reason of any arrangement like that.

Mr. Works: Not in the technical sense at all, but I am attempting to show, if the court please, that Mr. Zuckerman was not the victim of this combination of which he complains.

The Court: Well, of course, counsel, we have to recognize this: It doesn't make any difference whether he sold to Crystal or to Holly or to Spreckels during those three years. They were paid on the same basis.

Mr. Works: That is right.

The Court: So there wasn't any advantage to him in shifting around from one refinery to the other.

Mr. Works: I didn't mean that at all.

The Court: So, as far as those three particular years are concerned, I think I can see very quickly the picture here. I don't think we need to spend any time on it.

Mr. Works: All right.

The Witness: There came times during that period, your Honor, that Crystal was very reluctant to give me a contract for beets.

Mr. Works: I'd better put these letters in, I think, your Honor.

The Court: In other words, they wanted their money?

The Witness: Yes. [300]

(Testimony of Roscoe C. Zuckerman.)

The Court: Well, they were extending you a pretty heavy line of credit, weren't they?

The Witness: I thought so.

Mr. Works: Well, your Honor has the factual situation in mind.

The Court: If you loaned me \$125,000, I wouldn't feel very bad.

Q. (By Mr. Works): Did I understand you to say that the island acreage, productive acreage, was about 5,000 acres? A. Yes.

Q. In the course of the year 1939, did you raise any crop there except sugar beets? A. Yes.

Q. What?

A. I had barley, potatoes, onions. I think that was all.

Q. Was that true in 1940 and 1941, you raised other crops?

A. Yes. I had similar crops in 1940 and similar crops in 1941.

Q. How many acres of the various crops did you raise in 1939, the ones you have mentioned? Can you give us the comparative acreage?

A. There was approximately—— [301]

The Court: All we are interested in is beets, isn't that right?

Q. (By Mr. Weeks): What was the beet acreage there for those three years?

A. 1939, I think, was 1,000 acres of beets.

Q. And 4,000 in other crops, or was some of it lying idle?

(Testimony of Roscoe C. Zuckerman.)

A. There was considerable idle acreage that was not planted.

Q. In 1940, what was the beet acreage?

A. 1940, I think that was 1200 acres.

Mr. Arndt: Counsel, I will supply the exact information for you, if you want it, and put it in a stipulation.

Mr. Works: I don't need it. I can get it much quicker this way.

Q. What was the acreage of sugar beets in 1941?

A. That is hard for me to remember.

Q. Can you approximate it?

A. As I remember, there was quite a large acreage planted, but not such a large acreage harvested. I think maybe the contract was for 1,000 acres and there was about 600 acres harvested or 500 acres harvested.

Q. What are you growing on Mandeville Island now?

A. I am growing grain, potatoes, asparagus, asparagus nursery. I think that is about it. [302]

Mr. Works: That's all. Thank you.

The Court: Any further questions?

Mr. Arndt: No.

The Court: That's all.

Mr. Works: I might ask one further question, and I mean one, your Honor.

Q. How high did this indebtedness go, what was its top peak as between you and American Crystal, just so we won't have to dig it out of all these papers? Do you remember?

(Testimony of Roscoe C. Zuckerman.)

A. I think about 90 some odd thousand dollars or somewhere between 90 and 110. My memory of looking over the monthly balances that I owed Crystal——

Q. Do I understand that you didn't get the full \$125,000 you mentioned in this letter of December 2, 1937?

A. I could have gotten that amount, but there were payments in the interim. They may have advanced a total of \$125,000 on the one side and received payments on the other, which made the monthly balance not as great as that.

Mr. Works: We get it. Thank you.

(Witness excused.)

Mr. Arndt: Mr. Evans. [303]

KEITH EVANS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Keith Evans.

Direct Examination

By Mr. Arndt:

Q. Where do you reside, Mr. Evans?

A. In Stockton, California.

Q. How long have you lived in Stockton?

A. Since 1934.

Q. What is your occupation at the present time?

A. Farmer.

(Testimony of Keith Evans.)

Q. How long have you been in the farming business in California? A. Since 1934. [304]

Q. What is your specific job at the present time?

A. My specific job at the present time is general superintendent for the trust department for the Bank of America.

Q. On any particular properties?

A. Yes. At the moment I am handling the Rosetti Estate on Victoria Island and Woodward Island.

Q. And is that part of the San Joaquin Delta?

A. That is right.

Q. Are those located in San Joaquin County?

A. That is right.

Mr. Arndt: If the court please, if it would be any help to the court I have a map of the county in case your Honor would like to see just where the islands are.

The Court: Counsel, I am working on a case now involving the San Joaquin River and the Friant Dam. I am quite familiar with that territory.

Mr. Arndt: All right, your Honor.

Q. (By Mr. Arndt): Now, prior to this job you had on Victoria and Woodward Islands, by whom were you employed?

A. By the Edward DeCandia Company in Stockton.

Q. Was that in connection with farming operations? A. Yes.

Q. Now, in connection with sugar beets what has been your experience in connection with the produc-

(Testimony of Keith Evans.)

ing of sugar [305] beets in the San Joaquin Delta?

A. I grew sugar beets under a contract with the Holly Sugar Company from 1934 to 1937.

Q. Where was that? A. On Empire Tract.

Q. Now, with reference to the particular property involved in this litigation and when you had contracts for sugar, where was that property located?

A. That property was located on Holland Island known as the Holland Tract in Contra Costa County.

Q. Is that also in the San Joaquin Delta?

A. Yes.

Q. At any time did that tract have any other name?

A. Well, I think the American Crystal Sugar Company changed the name of it to American Island.

Q. Now, at the time that American Crystal acquired ownership of that island were you raising sugar beets on that island?

A. Prior to that time?

Q. Yes. A. Yes, one year.

Q. For whom or with whom?

A. I grew beets for the American Crystal Sugar Company in 1938 under a contract that they had given to a Mr. Hays, who had the lease on the same property. [306]

Q. And then when American Crystal took over the property as owners you were under a contract with Crystal at that time? A. That is right.

(Testimony of Keith Evans.)

Q. And then you signed an agreement with Crystal for what years? A. 1939.

Q. And then 1940, '41 and '42, is that correct?

A. Yes.

Q. And during those years you were also a tenant of Crystal? A. That is right.

Q. Now, did you have any conversation with anyone connected with Crystal about this change in the contract from the individual return of Crystal alone, to the joint return? A. Yes.

Q. With whom?

A. With Frank Cleveland. He was their agricultural man.

Q. And when and where did that occur?

A. That occurred at their Clarksburg office at the time I signed the 1939 contract.

Q. And what was said?

A. Well, as near as I can remember I told Mr. Cleveland that—I asked him why we had that kind of contract for [307] that year—why they were paying off on the average instead of their individual returns like they had prior to that time.

Q. And what did he say?

A. Well, his excuse was that they had sold—
Mr. Works: Just a minute. What did he say, please?

The Court: Yes.

The Witness: What is that?

Q. (By Mr. Works): What did he say?

The Witness: It is pretty hard to remember the exact words.

(Testimony of Keith Evans.)

The Court: Just give us the sum and substance of what he said—not what you think it was, or whether it was an excuse or anything else. Just what he said in substance why the change in the form of the contract.

The Witness: His wording was that they had sold most of their sugar the previous year locally and that was the difference—that was the reason for the difference in the payoff. In other words, there was no freight involved and there was less sales expense and what not.

Q. (By Mr. Arndt): Was there anything further said by either of you in that conversation?

A. No, other than the fact that he said that that was their contract that was being made for that year.

Q. Now, did you have any subsequent conversations on that same general subject with anyone connected with Crystal? [308]

A. I don't think so.

Mr. Arndt: That is all.

The Court: Cross examine.

Mr. Works: Yes, your Honor.

Cross Examination

By Mr. Works:

Q. You had this conversation with Mr. Cleveland at the Clarksburg office when you signed the 1939 contract? A. That is right.

Q. And in what month and what year was that?

A. I imagine it was December or January—December of '38 perhaps, or January of '39.

Q. December of 1938 or January of 1939?

(Testimony of Keith Evans.)

A. I believe so, yes.

Q. And when he mentioned the element of freight did you have any further discussion with him along that line? A. No, I don't believe so.

Mr. Works: That is all.

The Court: I am interested to know whether he knew that part of the beets were being shipped to Oxnard?

The Witness: Yes, I knew part of the beets were being shipped to Oxnard.

The Court: When did you first learn that?

The Witness: Well, I happened to farm on the American Crystal Sugar Company's ranch and they had a drag line there [309] that was used for keeping canals clean and making ditches and when they made that transfer at Stockton from barges to gondola cars to be shipped to Oxnard, they used the drag line off the ranch down there and I knew that that machine had been sent to Stockton primarily for the beet transfer.

The Court: In other words, during the term of the contract you knew that your sugar, part of your beets were being refined at Oxnard?

The Witness: That is right.

Q. (By Mr. Works): Just to clarify that. The freight item that you were referring to and which you and Mr. Cleveland discussed, was the freight on beets from Clarksburg to Oxnard, is that correct?

A. No. My understanding was that it was refined sugar.

Q. Refined sugar from where to where?

(Testimony of Keith Evans.)

A. Well, from the source of processing to the consumer. That was my impression, or the message that he was trying to convey to me.

Q. Did you have a pretty good crop in 1939?

A. 1939?

Q. Yes.

A. You mean in the way of tonnage or sugar?

Q. I mean in the way of tonnage of tonnage of beets.

A. No, the tonnage wasn't too large in 1939.

Q. How was the sugar crop? [310]

A. The sugar content was not bad.

Q. How was the sugar crop? A. The crop?

Q. Yes, in California in 1939?

A. The sugar crop in 1939 I think perhaps was a little below average.

Q. Below average? A. Yes.

Q. How much did it fall off?

A. Well, that would be pretty hard for me to remember without the records.

Q. The '40 crop was below average, too, was it? I mean the '40 sugar production?

A. Are you speaking of sacks of sugar now or tons of beets?

Q. I am speaking now of——

The Court: Look out, counsel, you are going to be under cross examination yourself.

Mr. Works: Perhaps I should be, your Honor.

Q. (By Mr. Works): I am talking about sugar production in the State of California now for the crop year 1939.

(Testimony of Keith Evans.)

Mr. Arndt: Northern and Southern California both?

The Court: Counsel, why ask this witness that? You have the figures there. There can't be any question as to the amount of production in California in the various years. [311]

This man is a farmer of beets. How does he know whether it was good or bad all over?

Mr. Arndt: I told counsel I will stipulate to any figures he gave me.

Mr. Works: I am somewhat interested in his pre-occupation with freight at that time, before the 1939 bumper crop had come in. However, we can show the facts, your Honor.

The Court: He hasn't testified to any bumper crop. Did you have a bumper crop at any time?

The Witness: Not to my knowledge.

Mr. Works: I am talking about sugar. That is all. Thank you.

The Court: That is all. We will take our afternoon recess of five minutes at this time.

(Short recess.)

The Court: You may proceed.

Mr. Arndt: If the court please, with the exception of certain matters that are going to be supplied by stipulation we rest.

The Court: May I ask counsel this question. As I stated before I have lived with this case for so long and so many other cases are intertwined with

it, that there is a doubt in my mind as to the statute of limitations.

Mr. Works: There is the question which has been discussed previously. [312]

The Court: The statute you mean of extension.

Mr. Works: The effect of the moratorium, yes.

The Court: The reason I asked that question is I notice the Evans case was not filed until 1948.

Mr. Arndt: Your Honor has held that the Evans claim is restricted to the last crop year. The only crop year involved in the Evans matter is the year 1941. Your Honor has ruled on that.

Mr. Works: Your Honor granted a motion as to 1939 and 1940.

The Court: That was a question that came to my mind. That clears up that point. Did Judge Mathes rule on that?

Mr. Arndt: You ruled on it yourself.

Mr. Works: Yes.

The Court: That is nothing. I have had cases that were appealed on me and counsel wanted to spread the mandate and I couldn't remember the case.

Mr. Works: First, your Honor, I would like to take up the matter of the sugar marketing quotas which were in effect during this period, imposed by the Department of Agriculture.

Mr. Arndt: If the court please, here is a document which was never before presented to me. I presented counsel with all of mine. I have never seen this until this minute.

Mr. Works: We will withhold it until tomorrow

morning and you may take it home with you tonight if you wish. [313]

The Court: Counsel, why don't we do as we have been doing, that any document that is introduced is always subject to correction if either party should find it is erroneous or wants to raise any question about it.

I am not a stickler on technicalities. All I want is the facts and any document you introduce here is subject to correction if you find you are in error. I am always willing to have such a matter taken up.

Mr. Works: I understand that, your Honor.

The Court: You need not be frightened that somebody is going to hurt you because if you find you have stipulated to something that you shouldn't have I will relieve you of the effect of the stipulation.

Mr. Arndt: I don't understand the purpose of this document at all. I don't see any issue——

Mr. Works: It is just to lay the foundation as to sugar quotas and their effect upon our output from Clarksburg during these three critical years.

There were acreage allotments in the first place. The amount the growers could grow was restricted. The amount the sugar companies could sell was restricted. These go directly to meet the issue tendered by the complaint that these companies had control of whatever they wanted to do with reference to sugar in Northern California.

The Government did the controlling and we want your [314] Honor to have the benefit of this evidence because it had an effect.

The Court: Well, gentlemen, for a day and a half

I have been admitting evidence which I didn't know was admissible or not. I will admit this subject to a motion to strike. I don't know the theories of the parties except generally.

Mr. Works: I have stated ours as showing we were controlled from above by the Government, both as to the acreage relating to the growing of the beets and the marketing of the sugar which had an effect on how much we could sell and which meant a larger carryover and that is one of the things Mr. Arndt is complaining about.

Mr. Arndt: You don't contend under this order that there was anything here that required you to enter into this joint return?

Mr. Works: It isn't for that purpose.

Mr. Arndt: Just a minute.

Mr. Works: It isn't for that purpose at all. It is to show a control upon the amount of sugar which could be marketed—a Governmental control.

Mr. Arndt: We object to it as incompetent, irrelevant and immaterial and not within the issues of this case. We make no objection to the competency of the particular document as not being the original. [315]

The Court: Objection overruled subject to a motion to strike. I am going to let you pour it in because you have poured it on me so far.

Mr. Works: I don't think we will compete with Mr. Arndt in volume, your Honor.

The Court: I hope not. That is all I can say.

The Clerk: Defendant's Exhibit A in evidence.

Mr. Works: Now, these are Department of Agri-

culture press releases as to acreage allotments to the growers. We are introducing these on the assumption that your Honor can take judicial notice of the official acts of a department of the Government.

The Court: I presume they were all published in the Register.

Mr. Works: I think so, yes. Not perhaps in this particular form. This is a press release as to what they had done and what they actually had done was certainly set out in the Register.

Mr. Arndt: We stipulate these are press releases but we object to them as incompetent, irrelevant and immaterial.

The Court: I am going to admit them, counsel, subject to a motion to strike. I can't tell whether they are material without reading them. What are the dates on those documents?

Mr. Works: Exhibit A.

The Clerk: The last exhibit is Plaintiffs' Exhibit B. [316]

Mr. Works: It started out with a notice, re-allotment of the 1939 sugar quota for the domestic beet sugar area.

The Court: What I am trying to ascertain is those were not war measures; those were measures due to the economic stress of the thirties?

Mr. Works: Under the 1937 sugar act, yes, your Honor. [317]

Mr. Works: The meat of this document consists of findings and a recitation of the hearings had with reference to the fixing of quotas.

The Court: That is the same as we had on other crops, hearings of growers.

Mr. Works: Exactly.

The Court: And fixing of quotas.

Mr. Works: Yes, your Honor.

The Court: They didn't fix the price which was to be paid the grower for the beets, did they?

Mr. Works: No. The material portion here appears, the first part, on page 8. "The 1939 sugar quota for the domestic beet sugar area is hereby allotted to the following purchasers in the amounts which appear opposite their respective names." Then there is a list of names, among whom appear American Crystal Sugar Company, allotment short tons, raw value, 170,174.

The Court: Where is that material except to give the court a little bit of the background of the industry?

Mr. Works: Well, we will show your Honor the effect which these allotments had. I won't go into the detail as exhibited here, but we will show you the effect which these allotments and quotas respectively had upon our operations.

Mr. Graham, will you take the stand, please? [318]

ROBERT H. GRAHAM

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert H. Graham.

Direct Examination

By Mr. Works:

Q. Where do you live, please, Mr. Graham?

A. Denver, Colorado.

(Testimony of Robert H. Graham.)

Q. What is your business or occupation, please, sir?

A. I am manager of the tax department of the American Crystal Sugar Company.

Q. How long have you been connected with the company?

A. Well, 1911 till 1922, when I left, and returned in 1933.

Q. And you have been there ever since?

A. Yes.

Q. What position did you hold with the company during the years 1938 through 1942, please?

A. Auditor.

Q. You were auditor of the company at that time. In that capacity and in your present capacity, did you have occasion to familiarize yourself with the books and records of the American Crystal Sugar Company as regards beet and sugar matters? [319]

A. I did.

Q. I show you a document headed "Effective Inventory at Beginning of Year, Production Quota, Current Year Production Available for Marketing that Year, and Marketings Calendar Years 1938, 1939, 1940, 1941, 1942, American Crystal Sugar Company."

Mr. Works: This document, Mr. Arndt, is taken in part from statistical records of the Sugar Division of the Department of Agriculture and in part from the records of the American Crystal Sugar Company.

(Testimony of Robert H. Graham.)

Q. Are you familiar with that, please, Mr. Graham? A. Yes.

Q. Are you able to say that the portions of that made up from the books of the company were taken from records which were true and correct?

A. They were.

Q. Will you state to the court what that document shows as regards the effect of the federally imposed quotas upon the distribution of sugar production and/or distribution of sugar during the years 1939, 1940 and 1941?

Mr. Arndt: If the court please, I have several objections. I first object on the ground in our interrogatories we made inquiry regarding sugar production, amount of sugar owned, and so on, outside of the entire American Crystal organization. [320] Objections were made to those interrogatories on the ground that the only thing we are interested in is the situation in California, and the objections were sustained to the interrogatories that went beyond California, and we were not permitted in our interrogatories to go into some of the very matters herein set forth. After refusing the information to us and after taking the position before the court that it was immaterial, they now come in with data setting forth some of the very data that was denied us as immaterial and they refused to furnish us on our request for interrogatories.

My second objection is that this witness is being asked for a conclusion regarding a document not yet in evidence.

(Testimony of Robert H. Graham.)

Mr. Works: I will obviate that.

Mr. Arndt: My third objection is that he is being asked for his conclusion as to what these figures show, which I feel is entirely improper. It is one thing to put figures from the books in and something else to ask this witness his conclusions as to what the figures show, and that is what the question is.

The Court: There were so many interrogatories that I tried to cut them down and I can't recall whether I cut this or not. I did try to hold you down to California, except to a very limited extent. Does this cover more than California?

Mr. Works: Yes, it does. It covers the national effect on production, to show the effect of the quota system upon [321] our over-all production, and then we will go into California from this. This is an over-all picture.

Q. (By Mr. Works): I state that correctly, do I not? A. Yes.

The Court: Counsel, you can make any explanation you want, but I think probably some of his objections are good. That feature, as I have stressed before, of an explanation of the increase in the freight during those three years——

Mr. Works: We are going to get to that.

The Court: I think somebody that knows can testify to that just as well as you can put it in in this way.

Mr. Works: Well, we can give it to you both

(Testimony of Robert H. Graham.)

ways. We have statistics prepared showing just what that is.

The Court: We have the California area involved, and it is the contention of the plaintiff up until the time of these three questioned contracts, that to a very great extent your California sugar was marketed in California, and that after entering into the new contract, your sugar was distributed to a greater extent than that, and those things are reflected by the additional freight necessary for the company to pay, and which the growers paid half of during those years.

Mr. Works: I will withhold this for the time being.

The Court: What I am getting at is this: I think outside of the information you have in that, we can have somebody testify on it. [322]

Mr. Works: No question about that.

The Court: I think the auditor can tell us about it just as well as anybody else.

Mr. Works: I think first we had better show you graphically what was done, and then the market conditions can be explained during those periods. This will go into that field, your Honor.

Q. I show you, Mr. Graham, a document entitled "American Crystal Sugar Company Productions and Deliveries of Clarksburg Factory Sugar by Crop Years for the period August 1, 1937 to July 31, 1943, Stated in Hundred Pound Units." Was that prepared from the books and records of the company? A. It was.

(Testimony of Robert H. Graham.)

Q. And it correctly sets forth the figures which are shown there? A. It does.

Mr. Works: This, your Honor will show production and deliveries in Northern California, Southern California, and other states during the crop years 1937 through 1942. May I offer that in evidence at this time?

The Court: Is there any objection to this?

Mr. Arndt: I would like to ask the witness one or two questions about it and see just what it means. Has the witness got it in front of him, counsel?

The Witness: No. [323]

Mr. Works: I beg your pardon?

Mr. Arndt: Has the witness got one in front of him so he can answer questions?

Mr. Works: He will have.

Voir Dire Examination

By Mr. Arndt:

Q. Now, this column that says "Production," to what does that refer?

A. That is the number of hundredweight of sugar produced at the Clarksburg plant during the periods shown there, the crop years.

Q. When you speak about deliveries, are you referring to delivery to an ultimate destination or are you referring to delivery to a warehouse or some other storage place, or both?

A. To the customers, ultimate.

Q. When it says "Other States," have you made any breakdown as to what those other states are?

A. Yes, we have that.

Q. Is that the data that is going to follow?

(Testimony of Robert H. Graham.)

A. I don't know in what order——

Mr. Works: He does not know, but I do. It is.

Q. (By Mr. Arndt): When it speaks about this, "Note: In this connection, consider production at Oxnard," what do those figures there mean?

A. That is the hundredweight of sugar produced at [324] the Oxnard factory during the crop years shown.

Q. Then these deliveries in Southern California are of deliveries of Northern California sugar into Southern California, is that correct?

A. That is right.

The Court: Any further objection?

Mr. Arndt: No, no further objection.

Mr. Works: I think, your Honor, I will offer these two in evidence together, because one is a breakdown of the other.

The Court: You had better introduce the other, counsel. We have been talking about it. To have the record clear, you better introduce it so it will be identified in the record.

Mr. Works: Yes, your Honor.

The Court: That will be Defendant's Exhibit C.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

The Court: We know what we are talking about, but somebody else reading this record won't know.

Director Examination (Continued)

By Mr. Works:

Q. I show you another document headed "Geo-

(Testimony of Robert H. Graham.)

graphical Distribution of Sales of Clarksburg, California Factory for Crop Years 1937-1942," giving a column of states from Arizona to Wyoming, and in parallel columns are the years from 1937 to [325] 1942. Will you please state whether or not that was prepared from company records and if they are true and correct? A. It was and it is.

The Court: As I understand, this covers a six-year period?

The Witness: That is right.

Mr. Works: That is correct, your Honor, yes. I will offer this document next, if I may.

The Court: Any objection?

Mr. Arndt: No objection.

The Court: It will be admitted.

The Clerk: Exhibit D.

Mr. Arndt: What is the number of that one?

The Clerk: That is Exhibit D.

Mr. Works: May I present this document to your Honor?

The Court: Has it been marked?

Mr. Works: It has, yes. I would ask your Honor particularly to note the increased quantity of sales in the three critical years here. That will assume some significance as we go along.

The Court: You may proceed.

Mr. Works: Thank you, your Honor.

Q. I show you another document headed "Acreage and Yield, Clarksburg District." That refers to beets, does it not? [326] A. It does.

Q. Was that made up from company records?

(Testimony of Robert H. Graham.)

A. It was.

Q. And is it true and correct? A. It is.

Mr. Arndt: May I ask one question right here?

Mr. Works: Surely.

Mr. Arndt: Does this include the beets that were raised under Clarksburg contracts that were shipped to Oxnard?

The Witness: Yes. Would you let me see that, Mr. Works?

Mr. Works: Surely.

The Witness: I will see if that is shown on there definitely or not. No. But it does include that.

Mr. Arndt: You say it does?

The Witness: Yes.

Mr. Works: I will offer this, if I may.

The Court: Is there any objection?

Mr. Arndt: No objection.

The Clerk: Exhibit E.

Mr. Works: If I may present this to your Honor, I might ask you to take note, if you will, of the increased tons per grower in 1938 and 1939 in the column which I now indicate.

The evidence will show, your Honor, that what is known [327] as the Western Sales Territory embraces five of the western states, and we also have some statistics here with reference to the production of the American Crystal Sugar Company individually, and then the relationship to other companies. This was obtained from the Beet Sugar Association, showing the percentages of sugar distributions by

(Testimony of Robert H. Graham.)

sales and production in the five western states. That includes California, of course.

We couldn't get a breakdown as to California alone as to this, because the records are not kept that way by the Beet Sugar Association, and we don't know what the other companies' sales and production were, unless we get it in this form from the Beet Sugar Association.

Mr. Arndt informed me this morning he would be willing to stipulate to this upon my stating to him that that was where we obtained it, and we believe these figures to be true and correct.

Mr. Arndt: It is stipulated it is a true and correct copy of what counsel says it is.

Mr. Works: All right. I will offer it then. These contain running percentages showing American Crystal's share in the western states—its percentage, I should say, both as to sales and production. This is what we call our high netting area.

The Clerk: Exhibit F. [328]

The Court: Do I understand that in F, this last column here refers to the percentage of the total amount of sugar produced by Crystal?

Mr. Works: As related to the total of all the competing companies.

The Court: I mean of the total sugar produced in the five states?

Mr. Works: Yes, your Honor, that is right. There is the percentage of sugar produced and then the percentage of sugar distributed during this period of years.

(Testimony of Robert H. Graham.)

Mr. Arndt: I assume, counsel, that the same figures give the information for Spreckels and Holly, also?

Mr. Works: They give the total of the competing companies. We don't know what their individual figures are.

In order that your Honor may have the full picture, we propose to put in the computations of the net returns from sales for each of these years, 1937, 1938, 1939, 1940, 1941 and 1942. They will show the breakdowns, including this freight item.

Mr. Arndt: I think you will find these are already included in my exhibit, but I have no objection to them.

Mr. Works: I know 1939, 1940 and 1941 are in one of the answers to the interrogatories and I am going to use that, but I want the witness to testify all these items of expenses signify amounts actually expended by the company in connection [329] with sales of sugar.

Mr. Arndt: Counsel, aren't these all figures prepared by Haskins and Sells?

Mr. Works: Yes. You don't dispute as to any of these net return tabulations that the expenses as shown here reflect actual expenditures by the company in connection with the sales of sugar, is that correct? Because, otherwise, I will have this witness prove it.

Mr. Arndt: If this is a copy of the Haskins and Sells report, I will stipulate to it as a copy of the

(Testimony of Robert H. Graham.)

Haskins and Sells report. That is what it appears to be to me.

Mr. Works: Well, it is.

Mr. Arndt: I will so stipulate.

Mr. Works: And you don't contest its correctness as to the items shown, is that correct?

The Court: In other words, as to the accuracy of their books?

Mr. Works: That is right.

The Court: They are taken from their books?

Mr. Works: Yes. Haskins and Sells took these all from our books.

Mr. Arndt: That is correct. I will so stipulate. In other words, I think I put the same thing in myself.

Mr. Works: Then you accept these figures as accurate, is that it? That is what I am trying to get at. [330]

Mr. Arndt: Accurate insofar as it is a reflection of what the books show for the particular item.

Q. (By Mr. Works): I will show you a document marked "Itemized Breakdown of Net Sales Returns per Hundredweight for Crop Years Shown Below," which are 1937 and 1938. That was made up from the books of the company?

A. It was.

Q. And correctly reflects what the books of the company—

Mr. Arndt: Just a minute, please. Did you make it up or did Haskins and Sells make it up?

The Witness: We both made it up.

(Testimony of Robert H. Graham.)

Mr. Arndt: What do you mean, "both"?

The Witness: We make up one and Haskins and Sells make one up, and we compare them to make sure they are right.

Mr. Arndt: All right.

The Witness: So Haskins and Sells did arrive at the figures.

Q. (By Mr. Works): Does that document correctly reflect gross receipts and all of the other items which are thereon shown? A. It does.

Q. Broken down to net sales return per hundred-weight? A. Yes. [331]

Q. And the freight items, freight on sugar to destinations as shown here, broken down to a cents per hundredweight basis, are moneys actually expended by the company in freight charges on the shipment of sugar, is that correct?

A. That is right.

Q. Now, these deductions, are those the deductions which are referred to in the beet growers contracts—I don't recall the exact terminology, but "Standard Methods of Accounting" or something of that sort, as the term is used?

A. They are.

Mr. Arndt: Just a minute. I object to that question as purely calling for an interpretation by this witness of a contract. I stipulate this is what the books show for the particular amount, and he has so testified.

Mr. Works: I will withdraw the question.

Q. Is this the form in which these net returns

(Testimony of Robert H. Graham.)

have been computed and approved by Haskins and Sells for the last 10 or 15 years?

A. Yes, sir.

Q. Would your testimony be the same as to the breakdown if——

The Court: You better introduce that and have it marked, counsel.

Mr. Works: Yes.

Mr. Arndt: May I ask a question first? [332]

Mr. Works: You may.

Voir Dire Examination

By Mr. Arndt:

Q. In making out this report, you first take in dollars and cents the gross receipts, isn't that correct? A. That is right.

Q. Then you take the dollars and cents of these various other items, and you get a dollars and cents net return, isn't that correct?

A. That is correct.

Q. Then when you have this net return, in order to get the net return from sales per hundredweight, does that hundredweight refer to sugar or does it refer to beets? A. Sugar.

Q. And that refers to sugar that is sold, is that correct? A. Sugar sold.

Q. Now, how is that tied into the beet production?

A. It is not tied in in any way that I can see.

Q. You have a certain figure that you get from Clarksburg, a certain net return. You have a certain

(Testimony of Robert H. Graham.)

net return that you get from Oxnard. Isn't that correct? A. That is correct.

Q. Then you apply that net return to the beets that were produced in the particular district, or do you apply it [333] to the beets that were processed in the particular district?

A. We apply it to the beets that are purchased under the contract in the particular district.

Q. So then the beets that were processed at Oxnard, but were produced in the Clarksburg district are not in any way applied to this net return that you show here?

A. You mean the sugar produced from those beets?

Q. Yes. A. No.

Mr. Works: May I have that question again?

(The question was read by the reporter.)

The Court: Is that marked?

Mr. Works: I think I am one behind, your Honor.

The Clerk: I think that is Exhibit G.

The Court: He was asking questions before this was admitted, and now I want to see what it is all about.

The Clerk: Is this a different one?

Mr. Works: Yes, that is 1942.

The Clerk: They will be G and H.

Mr. Arndt: Have you given me the next one, counsel? I have two here that are duplicates.

(Testimony of Robert H. Graham.)

Mr. Works: I am sorry. I thought I gave you both of them. Here is the other one.

The Court: Mr. Witness, I wish you would explain this a bit more to me so that when I get away from all these good [334] teachers, I will know what it may mean. Now, freight. You say in the year 1937 that represented a charge against the beets in that year for that amount.

The Witness: A charge against the gross receipts.

The Court: In other words, what I am getting at is this. Under 1937, you have freight on sugar to destination. You have two figures here.

The Witness: That is the total of these two. [335]

The Court: And then under the 1938 item you have .1912 and for 37 .287?

The Witness: Yes.

The Court: Do I get from that that the portion of freight in 1938 was less than in 1937?

The Witness: That is right.

The Court: That is what you are trying to demonstrate?

The Witness: Yes, sir.

Mr. Works: Here are the comparable figures for the three critical years, your Honor.

The Court: Well, we will want them.

Mr. Works: That is right. I am referring your Honor to the chart which is set out in the answer to Interrogatory 96.

Q. (By Mr. Works): I will ask you to examine that if you will, Mr. Graham. It consists of two pages. Your gross receipt figure on the first page and then

(Testimony of Robert H. Graham.)

the various deductions. Now, would your testimony be the same as to these computations of the returns?

Mr. Arndt: We have put in 96 as part of the interrogatories.

Mr. Works: That is what I am referring to.

The Witness: Yes.

Q. (By Mr. Works): And the freight items are shown in the same form across the table for 1939, 1940 and 1941, [336] is that correct?

A. That is correct.

Q. .438 and .387 and .322? A. Yes.

The Court: What was the first one?

Mr. Works: .438, your Honor.

The Court: And the others?

Mr. Works: Perhaps it would be helpful if we were to prepare a chart showing these right straight across.

Mr. Arndt: I intend to do that, your Honor.

The Court: Somebody is going to have to do it because I am not an auditor and in order to follow you I will have to have it.

Mr. Works: We will be glad to do it.

Q. (By Mr. Works): Now, the deductions from gross receipts shown on the exhibits I have just been referring to, and shown also in this answer to Interrogatory No. 96, represent charges which are made against gross receipts in order to determine the net, is that correct? A. That is correct.

Q. In other words, the greater the charge is the less the net as the same is used in the sugar table and vice versa, is that right?

(Testimony of Robert H. Graham.)

A. That is right.

Q. Now, is any charge made against the grower for [337] manufacturing expenses? A. No.

Q. Is any charge made against the grower for cost of beets? A. No.

The Court: Cost of what?

Mr. Works: Cost of beets—part of our manufacturing cost, your Honor.

The Court: Cost of beets?

Mr. Works: Cost of beets, yes. I see what your Honor has in mind. That is a term which is used in our bookkeeping.

The Court: I would like that explained so I can follow it.

Mr. Arndt: The cost of beets is what they pay the grower at the end of the year.

The Court: Isn't that a cost of doing business?

Mr. Works: I am leading up to this, if I may. There has been a good deal of testimony and remarks here about the shipping of beets from Clarksburg to Oxnard.

Q. (By Mr. Works): I will ask you how that item of expense, the freight paid on beets shipped from Clarksburg to Oxnard, is carried on the books of the company?

A. It is charged to freight account.

Q. And is it charged to manufacturing expense or to [338] cost of beets in any way?

A. Manufacturing expense.

Q. Manufacturing expense? A. Yes, sir.

(Testimony of Robert H. Graham.)

The Court: Is any part of that charged to the grower?

The Witness: No, sir.

Mr. Works: That was my next question.

Q. (By Mr. Works): The answer is none of it was charged to the grower, isn't that correct?

A. Correct.

Mr. Works: Do you have a copy of your 1941 settlement with Evans that I can use? I have the Zuckerman copy here.

Mr. Arndt: Yes. If I haven't it I will have it for you in the morning. I have it somewhere here. It is either here or in my office.

Mr. Works: I would appreciate it.

The Court: I imagine when you start looking for something it is a first class job.

Mr. Arndt: I will get it for you before the case closes.

Mr. Works: Well, I thought I would put in these settlement sheets each year to show the basis on which they actually were settled with at the time.

The Court: Are those copies? What I am getting at is if this is a copy why not use it. [339]

Mr. Arndt: He says he is only missing one of them and he wants me to furnish it and I told him I would as soon as I find it.

Mr. Works: I have Mr. Zuckerman and Mandeville here but not Evans.

Mr. Arndt: We will stipulate to them, counsel.

Mr. Works: All right. These show the utilization of the net return, if the court please, to the

(Testimony of Robert H. Graham.)

sugar tables in the contracts to produce the growers' payoff and these show the amount the grower received for each of these years and how it was computed. May I have these marked in evidence?

The Clerk: Separately?

The Court: Are you offering them as one exhibit?

Mr. Works: Either way, one exhibit will be all right.

The Clerk: Plaintiffs' Exhibit I.

Mr. Works: You may cross examine.

The Court: May I ask this question. Was part of this witness's testimony read into the record?

Mr. Works: Yes, your Honor.

Mr. Arndt: Yes.

The Court: Proceed.

Cross Examination

By Mr. Arndt:

Q. Now, referring to these Exhibits G and H and the corresponding Exhibits which were set forth in answer [340] to interrogatory 96, I call your attention to this item "Sales Department, Salaries and Traveling Expenses."

Now, isn't it correct that that includes the salaries and expenses of the western office and a portion of the salaries and expenses of the Denver office?

A. Yes.

Q. So that insofar as that particular item is concerned the greater the sales for a particular year the smaller will be the unit charge for that particular item?

A. Yes.

(Testimony of Robert H. Graham.)

Q. So that if the Clarksburg beets—I will withdraw that.

If the sugar that was produced from the Clarksburg beets that were shipped to Oxnard had been included in this tabulation the amount of miscellaneous sales department expense would have been smaller?

A. Any sugar you include there would make it smaller.

Q. And isn't that true—that also would be correct for each of the other items under sales and marketing expenses that you have here?

A. Not necessarily, no.

Q. As to which items wouldn't it be true and to which items would it be true, taking first this item of insurance on sugar only?

A. If you had more sugar included in the calculation [341] you would have more insurance premium and the division per bag might be greater or lower.

Q. Isn't that particular insurance—isn't that the insurance on sugar in storage only? A. Yes.

Q. Assuming that sales were actually made of the sugar that was made from the beets that were shipped to Clarksburg and shipped to Oxnard and there was no storage thereon then the non-inclusion in these schedules of those sales——

The Court: Now, counsel, just a moment. Isn't that dealing with the question of accounting—your other cause of action?

Mr. Arndt: That and also deals with the ques-

(Testimony of Robert H. Graham.)

tion of the use of the 1938, 1939 and 1940 single figures such as these are, on the basis of damages.

We contend, first, that the contracts are completely illegal and can't be used for any purpose. However, counsel says even though they are illegal they want to use them for the purpose of damages.

Replying to that we are endeavoring to show that they are not even proper for that purpose because here we have 15 per cent of the beets being shipped to Clarksburg—from Clarksburg to Oxnard as we will show when we present our figures, and yet none of that is included in these tabulations. [342]

The Court: That is your theory, that the contracts are void, but wouldn't that question be raised in the accounting feature and not under the antitrust feature?

Mr. Arndt: But Mr. Works insists——

The Court: Both of you are doing a lot of insisting but I am going to do some deciding one of these days.

Mr. Arndt: Mr. Works says the measure of damages is to take these figures as shown in 96, which are the American Crystal's individual breakdown. He wants to take those figures and subtract them from the joint figures and he wants to use that as the method for determining the damages. That is his theory.

The Court: You are each advancing your own theories as to this. Now, as to the figures you have them in evidence and I want to ask this witness a few questions and see if he knows the answers.

(Testimony of Robert H. Graham.)

Do you know anything about these contracts, the 1939, '40 and '41 contracts?

The Witness: Some, yes.

The Court: Do you know why they changed their method?

The Witness: No.

The Court: In the operation of your refinery it is a fact that you settle with the grower on the market price of sugar at the time you finish refining it, do you not?

The Witness: On the amount we receive from the sale [343] of the sugar.

The Court: Actual sales?

The Witness: Yes.

The Court: But very often you have a carry-over?

The Witness: That is right.

The Court: In other words, there is generally a carryover, is there not?

The Witness: Generally, yes.

The Court: That is through the years. In other words, you might produce, as you show here in one year a certain amount of sugar, when as a matter of fact instead of selling that exact sugar you would be selling some that was in storage?

The Witness: That is right.

The Court: And then you would settle with the grower on the basis of an equal amount of sugar from storage?

The Witness: Yes.

The Court: And the amount that you received?

The Witness: Yes, sir, the amount we sold during the year.

(Testimony of Robert H. Graham.)

Q. (By Mr. Arndt): Under the 1943 and 1944 contracts that was not correct. In 1943 and 1944 the Crystal Clarksburg contract which we put in evidence provided that the grower should be paid on the average net return from the crop produced during that crop year regardless of when sold. [344]

The Court: We are not talking about that. I am trying to find out what they did up until 1942.

You never then as a matter of fact settled with a grower on the exact sugar that he produced?

The Witness: No.

The Court: Of necessity you would not do that?

The Witness: That is right.

The Court: In other words, the grower wouldn't wait two or three years for you to sell the sugar as a rule?

The Witness: That is correct.

Mr. Arndt: That is what the 1943 and 1944 contracts provided, your Honor.

The Court: Then they were rich enough by that time to hold out. Ordinarily a farmer wants to turn his crop into money as soon as possible.

Mr. Arndt: Under these agreements this is what happened.

The Court: Has that been the method of handling the sugar during your entire experience with the company?

The Witness: No, years ago it wasn't.

The Court: What do you mean by "years ago"?

The Witness: We would settle on sugar produced in one year and sold during the crop year. There would be a carryover there. [345]

The Court: And settle when sold?

(Testimony of Robert H. Graham.)

The Witness: No, it did not enter into the calculation. That was 15 years ago.

The Court: What did you do in 1936, '37 and '38?

The Witness: It was all included in the computation—all the sugar sold within that 12 months, no matter which crop it was from was included in the calculations.

The Court: And that continued up until 1943 or 1944?

The Witness: Yes.

The Court: You may proceed.

Mr. Arndt: It continued in 1942, your Honor, and then in 1943 they had a different system and in 1944 and 1945 the grower was paid based upon production regardless of when sold. That is what the contracts show.

Q. (By Mr Arndt): Then in these particular computations that are here, these are based upon the sales during the crop year regardless of what carry-over there was at the beginning of the year or what carryover there was at the end of the year?

A. Yes; includes all the sales during the 12 months period.

The Court: In other words, as I understand it, it includes an equivalent amount of sugar?

The Witness: Yes.

The Court: That was produced? [346]

The Witness: Yes—no, no, not the equivalent of what was produced.

The Court: That was what you were paying for.

The Witness: No.

(Testimony of Robert H. Graham.)

Mr. Arndt: No, that is the vice of the whole situation. These are based upon the actual sales made during the year. In other words, supposing during the year there was a million pounds of sugar produced from a growers' particular beets produced during that year, but suppose they actually sold 500,000 pounds. They are paid on the 500,000 pounds regardless of what they produced. They are paid on the sales regardless of how much——

The Court: How are they paid for the other 500,000 pounds? As it is sold?

Mr. Arndt: No, they get nothing for that.

The Witness: Oh, yes.

Mr. Works: That isn't correct. I would like to have the witness dispel that illusion. Tell about the carryover.

The Court: Just a moment.

Mr. Arndt: If there is an increase in price on the carryover Crystal gets the full benefit of that and the grower gets nothing.

The Witness: That is not correct.

Mr. Works: Will you explain that to his Honor, please. [347]

The Witness: We will use Mr. Arndt's illustration. We produce 1,000,000 pounds of sugar. We sell 500,000 pounds in the first crop year.

Mr. Arndt: And I cease to be a grower.

The Court: Let the witness testify—be that courteous.

The Witness: That 500,000 pounds you sold would be the amount that you would calculate the

(Testimony of Robert H. Graham.)

net return on for that year. The 500,000 remaining would be sold in the next crop year and would enter into the computation for that crop year so the grower shares at some time in every bag we sell.

Mr. Works: And in the three years when the nets went up each year the grower was better off, isn't that it?

The Witness: Yes, sir.

Mr. Arndt: Take a situation in which the grower produced only in the crop year 1939 and produced nothing in 1940, would he have any share in the amount of sugar that was carried in 1940?

The Witness: No, but he would—maybe have a better share in the 1938 sugar that entered into the 1939 computation.

The Court: Just a moment. Let me see if I can understand you. Suppose in 1939 a grower produced and delivered to you beets that produced 1,000,000 pounds of sugar. In 1940 he didn't produce any. In 1939 you sold 500,000 pounds of that sugar that was produced in 1939. You would [348] settle with him on that basis, would you?

The Witness: That plus whatever 1938—

The Court: Suppose he just started to do business with you in 1939?

The Witness: I am talking about 1938 sugar that is sold. We don't know whether he produced it or not.

The Court: You don't know which grain of sugar is produced by one individual, but what I am trying

(Testimony of Robert H. Graham.)

to find out is this. As I stated you have sold only one-half of his sugar.

The Witness: Yes, if you tie it right down to that.

The Court: All right. You have only sold one-half of his sugar. In 1940 he produces no sugar but you sell the other half.

The Witness: Yes.

The Court: How is he paid for that other half?

The Witness: He wouldn't enter into that.

The Court: Wouldn't he get paid for it?

The Witness: He would get paid for his beets on the basis of all the sugar sold during the crop year of 1939. That included some 1938 and some 1939 sugar undoubtedly, and the 1939 that went over into 1940 would go to any new growers or old growers in figuring their net. It is a constant carryover from one year to another.

The Court: Then if a man is operating under one of [349] these contracts, either the 1938 or 1939 contract, and for just one year produced 100,000 pounds of sugar and in that year you sold only 50,000 pounds or one-half of it on the crop basis of that year, the next year supposing sugar advances a cent a pound, would that grower receive any of the benefits from that advance in price?

The Witness: Not if he didn't grow a crop in 1940, no.

The Court: On what basis would he be paid for the other half?

(Testimony of Robert H. Graham.)

The Witness: He would be paid on the carry-over from 1938 to 1939.

The Court: But he had none in 1938.

The Witness: No, but the sugar that was made in 1938 would enter into the computation for the 1939 to some extent.

The Court: That is too deep for me, gentlemen.

Mr. Works: Your Honor, he gets paid——

Mr. Arndt: That is exactly what we have been complaining about.

Mr. Works: Let us reverse your situation. Supposing the sugar market goes down the next year and he hasn't raised any that year, he doesn't lose either.

The Court: I am trying to figure out there their accounting method—how they account to the grower, but that [350] really has to do with the accounting angle of this case when you come down to it, but I am trying to as a matter of information find out if a grower furnishes beets from which is produced 100,000 pounds of sugar in that year and they—only sell one-half of it, how he is going to get paid for the other half. [351]

Mr. Works: He is selling beets, your Honor. He gets paid for every beet that he sells on the basis of what the sugar sold from that factory during that year brings. The carry-over of the sugar doesn't affect the fact that he has already been paid for his beets upon the basis of the current year's sales. Do I express that correctly?

The Witness: That is correct.

Mr. Works: Now, if he sells beets the next year

(Testimony of Robert H. Graham.)

and, say, the price goes up, he gets paid for those beets at what——

The Court: Suppose he just grows one year?

Mr. Works: All right. He is selling beets, that is the point, it seems to me, your Honor. He gets paid for every beet he sells, using as a yardstick this averaged net return from the sugar. If he doesn't sell the next year, if he doesn't grow the next year, he doesn't gain or lose or do anything else. He has already been paid for his beets.

The Court: Who gets the benefit if the price goes up?

Mr. Works: Who gets the benefit if the price goes up?

The Court: The increase.

Mr. Works: In that case, the processor would get the benefit, and if the price went down—and they go both ways all the time—then the processor loses. Furthermore——

The Court: If the price goes up, under your 50-50 contract, the refinery gets the benefit of half of it, doesn't it? [352]

Mr. Works: I don't know whether I am that good a mathematician. Is that right?

The Witness: Approximately, yes.

Mr. Arndt: That is right.

Mr. Works: If it goes down, what does he lose? Half of it?

The Witness: Half.

Mr. Works: Half. It is both ways. The point is, as far as this Sherman Act count is concerned,

(Testimony of Robert H. Graham.)

your Honor, you are perfectly right, because this has always been the way the yardstick has worked, both before and after these particular years.

Mr. Arndt: Pardon me. Not after, counsel. It was changed——

Mr. Works: Well, it wasn't changed in 1942, and there is no question in 1942. If they chose to use a different yardstick in 1944 or 1945, that is their privilege. There are a hundred ways in which you can determine the price, I suppose, and this is the way they were doing it from 1937 on through 1942, so it doesn't affect the Sherman Act count one way or the other, it seems to me. As your Honor says, there may be an accounting problem, but that depends on the contract determination.

The Court: Are you through with this witness?

Mr. Arndt: Yes.

Mr. Works : All right, Mr. Graham.

(Witness excused.)

The Court: We will recess until tomorrow morning at 10:00 o'clock.

(Thereupon, an adjournment was taken until 10:00 o'clock a.m., Friday, February 24, 1950.)

Los Angeles, California, February 24, 1950

10:00 o'clock a.m.

The Court: Call your next witness.

Mr. Arndt: May I ask Mr. Graham a few more questions, please?

The Court: I thought you would get an inspiration overnight.

ROBERT H. GRAHAM

the witness on the stand at the time of adjournment, being previously duly sworn, was examined and testified further as follows:

Cross Examination

By Mr. Arndt:

Q. Now, Mr. Graham, I want to show you a copy of Exhibit C. Now, this Exhibit C shows the American Crystal Sugar Company production and deliveries of Clarksburg factory sugar by crop years. Take this first crop year, 8-1-37 to 7-1-38. That is what is called the 1937 crop year, isn't it?

A. That is right.

Q. And here from 8-1-38 to 7-31-39 is the 1939 crop year? A. Yes.

Q. And so on? A. Yes.

Q. In other words, when we refer to a crop year of, [356] say, 1937, we mean a year commencing August 1 of 1937 and continuing to July 31 of the following year? A. Yes.

Q. On this particular list or schedule, the last column is headed "Total." Now, that last column which is headed "Total," does that represent the sum of the three previous columns? A. Yes.

Q. And then the column that is headed "Production" is not in any way totaled in reaching the total, but that is an independent item? A. Yes.

Q. Now, then, if we wanted to ascertain the per-

(Testimony of Robert H. Graham.)

centage of the deliveries for a given year that were Northern California, would we not take the last column, which is headed "Total" and divide that into the third column, which is headed "Northern California"? A. Yes.

Q. Now, have you made any calculations showing the percentage of Northern California deliveries for each of these years? A. No.

Q. But that is merely an arithmetical calculation, isn't that correct? A. That is correct. [357]

Q. Now, I will show you a copy of Exhibit D, which is called "Geographical Distribution of Sales of Clarksburg California Factory." Have you made any calculations showing the amount of freight that was paid on these sales to these various states?

A. No.

Q. Then, as I understand this particular chart, this shows the deliveries to each state for each year, each crop year, from 1937 through 1942?

A. Yes.

Q. And then at the bottom, where it says "Total," that represents the total for each respective crop year? A. Yes.

Q. Now, then, if we wanted to ascertain the percentage that the deliveries to any particular state bore to the total deliveries for that particular year, we would take the total as shown at the bottom and divide that into the amount shown for each particular state? A. Yes.

Q. And have you made any such calculations?

A. No.

(Testimony of Robert H. Graham.)

Q. Then that is merely an arithmetical calculation, isn't that correct? A. Yes.

Q. Now, then, looking at this Exhibit D, am I correct [358] that this shows that Illinois, Indiana, Maryland, Massachusetts and New York, for example, there were no sales there for 1937 or 1938 in any of those states, but there were sales in 1939, 1940 and 1941 to each of those states?

A. Yes.

The Court: May I ask a question? Just generally speaking, according to these charts, the amount of sugar that was sold locally is more or less constant?

The Witness: That is right.

The Court: When you have heavy production, that means sugar has to be shipped out of this area?

The Witness: Yes.

The Court: And that the heavier the production, the greater your freight will be? That is what you are trying to show by these charts, is it not?

The Witness: I don't know exactly, but that would be the effect of it.

Mr. Works: That is correct, your Honor, yes.

Q. (By Mr. Arndt): Now, taking the percentage of sugar that was sold in California during the years 1937 and 1938, where the total sales were \$423,268 and \$390,385, the percentage, take for the year 1937 and take your figure of \$253,997.00 for Northern California out of a total production of \$423,268, can you give a rough figure of the percentage that that bore? A. About 55 I would say.

(Testimony of Robert H. Graham.)

Q. And then for the year 1938 where California was \$287,730 and a total of \$390,385?

A. Approximately 60 per cent.

Q. Then for 1939 where it was \$267,508 for California against \$816,561?

A. 30 per cent approximately.

Q. Then for 1940 where the California sales were \$314,263 and the total was \$723,685?

A. About 40 per cent.

Mr. Works: Give us the percentage for '41. You don't have the exhibit?

The Witness: No.

Mr. Arndt: He said he made no such calculations, counsel. I asked him.

Mr. Works: Are you through with the witness?

Mr. Arndt: Yes, that is all. [360]

Redirect Examination

By Mr. Works:

Q. Now, will you make the same kind of calculation for 1941 where the total was \$1,054,489 and the California figure was \$516,178 bags?

A. Around 50 per cent.

Mr. Works: Thank you. May I reopen yesterday's direct examination, your Honor?

The Court: Certainly.

Q. (By Mr. Works): You were asked yesterday, Mr. Graham, about the allocation of the Denver sales office expense to Clarksburg and to the various mills of the company.

Now, how is that done? Is it done on a basis of

(Testimony of Robert H. Graham.)

volume of sugar manufactured or what is the criteria?

A. It is divided on the basis of bags sold by each plant.

Q. So if 100 bags only were sold out of Clarksburg in a given year its allocation to the Denver office expense would be quite small, is that true?

A. Yes, sir.

Q. Thank you.

Mr. Arndt: Just one minute.

Recross Examination

By Mr. Arndt:

In connection with the expenses of the San Francisco [361] office, were all of those charged to Clarksburg? A. No.

Q. Where were they charged?

A. To Clarksburg, Oxnard and to the Missoula, Montana plant.

Q. In what ratio?

A. The bags sold from each plant.

Q. You mean bags of sugar? A. Yes.

Q. In other words, all the sales expenses of that office were charged to sugar? A. Yes.

Q. Was any of it charged to molasses?

A. No.

Q. It handled molasses sales, did it not?

A. Some, yes.

Q. Also handled pulp sales, didn't it?

A. No.

Q. But it handled molasses sales? A. Yes.

Q. But none of the expenses of molasses sales

(Testimony of Robert H. Graham.)

were charged to molasses but all the expenses involved in the molasses sales were charged to sugar?

A. Yes.

Mr. Arndt: That is all. [362]

Mr. Works: Thank you, Mr. Graham. Mr. Holmes, please.

LESTER J. HOLMES

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Lester J. Holmes.

Direct Examination

By Mr. Works.

Q. Where do you live, Mr. Holmes, please?

A. Clarksburg, California.

Q. And what is your business or occupation?

A. I am manager of the American Crystal Sugar Company at Clarksburg.

Q. The Clarksburg plant?

A. Yes, the Clarksburg plant.

Q. How long have you been manager of that plant? A. Since 1934.

Q. And that was at a time when it was operated by another company?

A. Operated by the Amalgamated Sugar Company.

Q. And when did it become an American Crystal Sugar Company plant?

A. During the 1936 season.

Q. Now, have you had occasion to grow beets yourself prior to becoming manager of the plant?

(Testimony of Lester J. Holmes.)

A. Yes. I started growing beets in 1921.

Q. And where?

A. In the Holland district of Clarksburg.

Q. How long did you continue growing beets, Mr. Holmes?

A. I continued actively until I became manager of the American Sugar Company at which time I employed my brother to handle the operations and then later leased the property and am still leasing the property now to my boys who carry on the operation.

Q. Well, then, is it correct to say that as a beet grower you have sold beets to factories and as a factory manager you have bought beets from growers?

A. That is right.

Q. Now, I wonder if you would explain to his Honor how sugar beets were bought and sold during the years 1937 to 1942 without reference to the question of whether a single or a joint net was employed in the payoff?

Mr. Arndt: If the court please, we have in evidence the contracts during that period. If this is an attempt to vary the contracts I object to it.

The Court: I don't think that is the purpose. I think it is preliminary, is it not?

Mr. Works: Exactly.

The Court: To give the court a little background.

Mr. Works: That is correct, your Honor. [364]

Mr. Arndt: Just a minute. I make the further objection that the contracts are the best evidence as to how the beets were bought and sold.

Mr. Works: I was under the impression that it

(Testimony of Lester J. Holmes.)

was your thought that the 1939, '40 and '41 contracts were void.

Mr. Arndt: They are.

Mr. Works: The matter is still preliminary, your Honor.

The Court: What do you say about that, Mr. Arndt? You say they didn't have contracts for those three years.

Mr. Arndt: He is asking about 1937 to 1942. There is no question that the beets were bought and sold under the contracts. The contracts during certain of those years were void but nevertheless that is how they were sold.

The Court: Well, you can't stand on your contracts in one instance and refuse to in another. I don't know the purpose of this. I presume it is preliminary in an effort to advise the court as to the general method used, the same as you asked your grower yesterday about the growing of beets and how it was necessary to prepare the soil and plant the seed and cultivate and thin and weed and harvest them and the different methods. I don't think this is any more immaterial than that.

Mr. Arndt: Your Honor, I am not saying it is immaterial. I say it is an attempt——

The Court: I don't think it is an attempt to vary the [365] terms of the contract.

Mr. Arndt: Then the contracts are the best evidence.

The Court: The contracts are the best evidence of the method of sale, but if your position is correct they

(Testimony of Lester J. Holmes.)

had no contracts for those three years and then this line of questioning may go to what was the practice and custom in the industry.

Mr. Arndt: But during those three years, your Honor, they actually did use these contracts.

The Court: They used them but your theory is if there had been no contracts you would have gotten a different price and they are trying to show that you wouldn't have gotten a different price. I am going to overrule the objection.

Mr. Works: Will you read the question, please, Mr. Reporter?

(The question referred to was read by the reporter as follows:

“Q. Now, I wonder if you would explain to his Honor how sugar beets were bought and sold during the years 1937 to 1942 without reference to the question of whether a single or a joint net was employed in the payoff?”)

The Witness: There are really three factors in the determination of the contract. The first is the ability of the company——

Mr. Arndt: If the court please, he is now going into [366] something entirely different. He is now going into the mechanism of how the company arrived at certain figures set forth in the written document, which is not what the question called for at all, and is purely his conclusion and is entirely hearsay. There is no foundation whatsoever laid for any such matter. [367]

(Testimony of Lester J. Holmes.)

The Court: Counsel, you can make a motion to strike whatever is in the record, but there has been so much evidence introduced here that you introduced in your part of the case and I admitted, that I think I should be just as courteous to the other side and permit them to put in a case on their theories. Then I will try to see if I can work something out of it. I don't know if it is material or not.

It is true, there have been so many documents introduced here and stipulations of fact, that I haven't had an opportunity to read them. There have been depositions that I haven't been able to read or haven't had the opportunity to read as yet. There is a truck-load of exhibits.

In order to be fair to both sides, I think both sides should be permitted to place their case in on their own theory, and then when we get through, I will have my own theories. I probably won't agree with either one of you, at least 100 per cent.

Q. (By Mr. Works): Do you have the question in mind?

A. The next factor in the purchase of beets is the sales price of sugar during a certain period which the contract calls for.

The next factor is the amount of sugar in the beets purchased. Those two factors determine the amount that the growers receive, the average sales price for the year, plus the sugar content in the beets.

Q. In purchases made by American Crystal from Mandeville Island Farms Company and from Mr.

(Testimony of Lester J. Holmes.)

Zuckerman, where was delivery of the beets taken by American Crystal?

A. At a dump on the island where the beets were grown.

Q. That is on Mandeville Island?

A. On Mandeville Island, in the case of Mr. Zuckerman.

Q. Where was delivery taken of Mr. Evans' beets?

A. On a dump on what we called American Island.

Q. From time to time during the years 1937, 1938, 1939, 1940, and 1941, were certain beets which had been delivered to the company at Clarksburg or in the vicinity, shipped to Oxnard? A. Yes.

Q. To the company's plant at Oxnard?

A. To the company's plant at Oxnard.

Q. Did you have anything to do with making the determinations as to whether these beets should be processed at Clarksburg or, on the other hand, should be shipped to Oxnard?

A. I had that—originally, the plan was in consultation with Mr. Rooney and the Denver office and myself, as to whether or not we should transfer and as to the general amount, but during the actual transfer time, it was my direction of whether or not the beets went to Oxnard or whether they came to [369] Clarksburg, depending on the operation capacity of the plant at Clarksburg.

Q. You mentioned Mr. Rooney. For the record, who is he?

(Testimony of Lester J. Holmes.)

A. He is manager of the plant at Oxnard.

Q. What factors did you take into consideration in deciding that a certain shipment of beets should be made from Clarksburg to Oxnard?

A. There are several factors. First, if we had more beets than what we could efficiently handle at Clarksburg, in order to get through harvest before the winter rains set in, we made an over-all estimate of the beets to be shipped to Oxnard. If during this period of shipment, rains would interfere with our normal deliveries to Clarksburg and it looked like our slicing capacity would go down, beets would be diverted from the shipments to Oxnard to Clarksburg.

Q. Who paid the freight on those beet shipments from Clarksburg to Oxnard when they were made?

A. American Crystal.

The Court: Just a moment. Counsel, you have examined the record. Is there any dispute about that?

Mr. Arndt: No, your Honor.

Mr. Works: Is there any dispute about the fact that no part of the freight cost is charged to the growers? [370]

Mr. Arndt: No dispute.

Mr. Works: All right.

Q. Now, were any shipments made from Clarksburg to Oxnard in 1942? A. No.

Q. Will you state the facts as to why no such shipments were made?

A. I will state that, preliminary, we were making arrangements as early as March to ship beets to Oxnard. Then later in the spring, due to war conditions

(Testimony of Lester J. Holmes.)

and notice from the railroads that there would not be cars available for such shipment, we had to forego any shipments to Oxnard and work out another system.

Q. There has been some talk about bonuses given the growers in 1942. Did that bonus situation have anything to do with this railroad car shortage?

A. That, and labor, shortage of labor.

Q. State the facts as to what led to the payment of the bonuses in 1942.

A. We had a rather heavy crop coming on, and by reason of the fact that we could not ship beets to Oxnard on account of the railroad situation, shortage of cars, and so forth, and also by reason of the fact that our agricultural labor had gone into other industry, we could see that we could not complete harvest under normal conditions before the [371] rains set in, so we set up a bonus for early delivery, having in mind compensating the growers who were delivering to us, probably, when the beets were a little underripe, to compensate them for their loss in sugar for that early delivery.

Q. And what bonuses were given as to amount, do you remember?

A. I believe we paid \$1.00 from July 28 to August 1st, and from August 1st to the end of that week, 70 cents, and from the 10th to the 15th, I think it was 35 cents.

The Court: For what? A ton?

The Witness: Per ton.

(Testimony of Lester J. Holmes.)

The Court: Had you ever paid a bonus before that?

The Witness: No.

The Court: It was only during the war period you paid the bonus?

The Witness: Just during the year 1942.

The Court: Just the one year?

The Witness: We paid—if I may go to 1943—we paid just the opposite. We paid the growers to hold off for a month, rather than for early delivery. It was just the absolutely opposite condition.

The Court: Had that practice ever prevailed prior to the war?

The Witness: No. We were able to handle all of our [372] beets under normal conditions.

Q. (By Mr. Works): Is it correct to say, Mr. Holmes, that the conditions which led to the payment of these bonuses in 1942 did not exist in 1937, 1938, 1939, 1940 or 1941?

A. That is right.

Q. Now, yesterday we had some discussions about this carry-over of sugar from one crop year to the next. Had that situation had some historical development, Mr. Holmes? A. Yes, it had.

Q. Does the expression “free sugar” mean anything to you?

The Court: What is that expression?

Mr. Arndt: Free sugar.

Mr. Works: Free sugar, your Honor. There has been a certain development, which I think the other

(Testimony of Lester J. Holmes.)

side may or may not have in mind, and I would like to have Mr. Holmes explain it, if he can.

Q. There was a change in the method of handling carry-over sugar some time before these years in question, was there not? A. That is right.

Q. Will you state the facts in that respect, please? You have been on both sides of the fence, as a grower and as a buyer, so please tell us about it.

A. During the years previous to the contract, which was [373] established by the Amalgamated Sugar Company at Clarksburg, there had been a practice in certain competitive companies, the practice of setting aside all sugar held over at the end of the year, of the crop year. That sugar was considered theirs and called free sugar.

Q. You mean they closed their books by charging themselves for that sugar and regarded it as theirs from then on? A. As theirs.

Q. All right.

A. Then in the following year, or whenever they felt free to sell it, that sugar could be sold or would be sold at a certain price, the highest in the year probably, in the most favorable territory, and no accounting whatever was given to the growers for that sugar. That was called free sugar and was strictly a company affair.

The Court: What do you mean? The company kept all the sugar it did not sell?

The Witness: That is right.

The Court: And the grower only got paid for what they sold?

(Testimony of Lester J. Holmes.)

The Witness: No. The growers got paid for all of the sugar they handled.

Q. (By Mr. Works): All of the beets, you mean?

A. They got paid for all of the beets. In some cases, now, we are running off with a wrong premise, because [374] the grower is paid for the beets, not for the sugar.

The Court: I know, but your price on beets is governed by the price of sugar, and the sugar content of the beets.

The Witness: That is right.

The Court: So that under the old system, whether you sold them or not, the particular grower got his money.

The Witness: That's right, he got his money, but he did not get the advantage of this carry-over sugar.

The Court: In other words, he did not get any advantage of any fluctuation in price.

The Witness: In the next year. When the contract under which we now operate was put into force, it particularly specified that the sugar sold during that year enter into the computation of the net to the grower, and that practice has been carried on up to this time.

Q. (By Mr. Works:) Now, that is sugar manufactured at that plant and sold during a given year; that is the situation, is it not?

A. The sugar sold during a given year. ..

Q. That setup has the effect of stopping this free sugar practice, as far as the companies are concerned?

A. That is right.

(Testimony of Lester J. Holmes.)

Q. How?

A. By any carry-over that is held over after the end of the previous crop year being taken into consideration as the [375] sales during the next year. So if the price of sugar goes up, the grower who is growing it that year benefits from it. If the price of sugar goes down, in the same way he is penalized.

Q. In the old days he had nothing whatever to do with the following year, as far as his current crop of beets is concerned, is that it?

A. As far as participating in the——

Q. Under the free sugar part?

A. Under the free sugar part.

Q. If we apply that situation to Mr. Zuckerman, he sold in 1939, 1940 and 1941, and the record shows that starting with 1939, 1940 and 1941, the nets went up. That means that as to subsequent deliveries of beets, coupled with any of his sugar which was carried over into the following year, he shared in the price increases for that?

A. That is right.

Q. He got the benefit of them as applied to his next year's crop of beets, is that right?

A. That is right.

The Court: As a matter of fact, under that system, on the crop he sold in 1939, would he not profit by any increase in prices from 1938?

The Witness: That is right, yes.

Q. (By Mr. Works:) Do you have anything to do with the [376] sale of sugar, Mr. Holmes?

A. None whatever.

(Testimony of Lester J. Holmes.)

Q. You are acquainted with the plaintiff, Roscoe Zuckerman, also president, that was, of Mandeville Farms Company? A. Yes.

Mr. Arndt: He still is, counsel.

Mr. Works: Is he still president?

Mr. Arndt: Yes.

Mr. Works: All right. I didn't know his present status.

Q. Did you have a conversation or conversations with Mr. Roscoe Zuckerman about the joint net contracts prior to the time when he signed the first one in 1939? A. I did.

Mr. Arndt: Just a minute, counsel. The first contract he signed was in 1937.

Mr. Works: I am talking about the first joint net contract that he signed.

Mr. Arndt: Pardon me.

Q. (By Mr. Works:) Do you recall where that conversation took place?

A. I couldn't specifically recall whether it was on Mandeville or whether it was in his office, no.

Q. Was anyone else present, do you recall?

A. I couldn't say. [377]

Q. What did you and he talk about with reference to the joint net contract?

A. Well, generally, the conditions that would prevail.

The Court: Tell us in substance what was said.

The Witness: Well, I presented it to him that we were going from here on on the joint net contract. He agreed to go along, but felt that he would a whole

(Testimony of Lester J. Holmes.)

lot rather have gone along with us on a single net, rather than a joint net. I think that is the gist of the conversation.

Q. (By Mr. Works): This was before he signed his first joint net contract in 1939?

A. Yes.

The Court: There wasn't anything else for him to do, was there?

The Witness: Well, not necessarily.

The Court: He owed you a lot of money, didn't he?

The Witness: Yes, but——

The Court: What could he have done?

The Witness: He could have gone with Holly or Spreckels.

The Court: How could he have gone with them without settling up with you? I mean as a practical matter.

The Witness: Well, as a practical matter, yes.

The Court: As a practical matter, he was your customer and you had him tied up until he could pay you off. [378]

The Witness: I will agree to that for practical purposes.

Mr. Works: Cross examine.

The Court: Do you know anything about the arrangements by which they made this change over to joint return?

The Witness: Just this much, your Honor. It has a—I don't know the actual details, no, but I do know that it has an historical background, of which

(Testimony of Lester J. Holmes.)

our company had two or more factories in the East, where it was in operation. The growers were happy under that deal.

There is another company, however, one company operating 17, 18 factories, scattered through three states, which uses the joint net for all factories. Then American Crystal and Holly in Southern California were using that joint net.

The Court: Was that before they used it up North?

The Witness: That was before they used it up North. So that we just naturally, I suppose, transferred it up North, drawing in with the Spreckels and Holly production.

The Court: Do you know who made arrangements with Holly and Spreckels to join in this contract?

The Witness: I do not.

The Court: You didn't have anything to do with that?

The Witness: I didn't have anything to do with it.

Q. (By Mr. Works): As I understand your historical background——[379]

The Court: You mean as to the practice?

Mr. Works: I beg your pardon?

The Court: It has been in practice in other cases. [380]

Q. (By Mr. Works): Yes. Am I correct in understanding that it had its inception in a situation where one company was operating two or more mills and they adopted this plan to put their growers on a parity? A. That is right.

Q. Their own growers?

(Testimony of Lester J. Holmes.)

A. Their own growers.

Q. And then it spread to other growers?

A. Yes, sir.

Cross Examination

By Mr. Arndt:

Q. Mr. Holmes, the only case you know in which two competing companies went into a deal like this was the Southern California and the sole situation involving Crystal and Holly, isn't that correct?

A. Competing companies? Yes.

Q. And then other examples that you gave were similarly a case of one company having several factories and the one company having several factories had a joint return for its own factories but not for any competing company?

A. That is right; but at the same time they were scattered way out to where each individual factory undoubtedly had its own net.

Q. Now, to discuss this situation in 1939 and 1940 and 1941, isn't this a correct statement, that if a grower delivered [381] exactly the same tonnage in 1938 as he did in 1939 and in 1941 and in 1942 then he would get the benefit of any rise in price by getting it on his subsequent crop for the former crop, but that if he raised a smaller amount in the subsequent years than insofar as the difference was concerned between what he produced in 1939 and what he produced in 1941 he received no benefit of the increase, isn't that a correct statement? A. No.

The Court: In the first place, counsel, where does that have anything to do with this antitrust suit?

(Testimony of Lester J. Holmes.)

Mr. Arndt: Your Honor, this is in connection with the questions that he was asked in which he testified that Mr. Zuckerman received the benefit.

The Court: That is the accounting feature of the case. We have gone into many matters touching on the accounting feature, but when we come right down to it we are not trying that feature. The method for payment that we have been discussing for some time is no part of the conspiracy.

Mr. Arndt: That is correct, but it shows this, your Honor, it shows that this company profited tremendously on these large quantities of Zuckerman beets because Zuckerman or Mandeville produced so much more in 1939 than it did in 1940 and 1941 and insofar as that increase was concerned — this decreased production, it lost all advantage of any price increase [382] by virtue of this system and as far as the last year was concerned it lost even more.

The Court: But Mr. Arndt, I have been getting a rather free education here on the subject and the sugar problem. It is probably essential to a correct understanding of this case and it has been very interesting, but when you come down to the issues that we are now trying, and that is any damages sustained, if you can't prove damages you are out on a limb anyhow, so it is essential for you to prove that.

Now, where does that tend to prove or disprove damages by reason of these three years when it was a practice in the industry?

Mr. Arndt: If the court please, it might be the practice in California during certain of those years

(Testimony of Lester J. Holmes.)

but the contracts show that the witness was in error for subsequent years, because in the years the contracts were put in evidence, the evidence shows that for the year 1945, and I think for the year 1944, they used an entirely different system which I intend to examine this witness regarding because he has made the statement that it has been used right along and he is mistaken. The documents show the contrary. That was one of the very reasons at the start I objected because I felt he was going to testify contrary to what the documents showed.

Mr. Works: Well, in justice to the witness he was asked about the years 1937 through 1942, your Honor. [383]

Mr. Arndt: And then he was asked whether it continued since that time and he said yes, and it hasn't continued since that time as the documents themselves show.

The Court: Well, the contracts speak for themselves. As long as Crystal and the growers were dealing with each other free from any agreement or conspiracy they were both free agents and this act only covers those who conspired—the combination.

Mr. Arndt: That is correct.

The Court: So when you narrow it down what happened before and what happened afterwards is immaterial. There was no claim of conspiracy for those years. I have permitted evidence to be introduced along those lines under one of your theories on damages but only to that extent.

Mr. Arndt: The contracts in evidence show that

(Testimony of Lester J. Holmes.)

Crystal had two contracts prior to 1939 and one for 1937 and one for 1938. Its predecessor had contracts before that. Then subsequent it had several contracts. The contracts for 1937 and the contract for 1938 and the contract for 1942 were more or less similar. The contract for 1943 was entirely different because of certain Government controls and so on. In 1944 and 1945 the growers were paid based upon the sugar that was manufactured regardless of when sold. He received the full benefit of any price increase.

The Court: How would that be material in this case? [384]

Mr. Arndt: It shows again the result of free competition. We have free competition after it was over resulting in this different type of contract which instead of the company getting the benefit of the increase when a grower stops delivering, as your Honor pointed out yesterday, if a grower delivers only one year and doesn't deliver the second year the company gets the benefit—gets 50 per cent of the benefit of the price increase and the grower gets none and the other grower gets the other 50 per cent, but he gets none of it.

Now, that was the condition during 1939, 1940, 1941 and 1937 and 1938 and 1942. But it was not the condition in 1943, 1944 and 1945.

The Court: Counsel, let us be fair about it. During the war years I don't know whether there was free competition or not. It is a matter of common knowledge that prices and everything else were under Government control.

(Testimony of Lester J. Holmes.)

Mr. Arndt: But there certainly was competition so far as getting growers was concerned.

The Court: They were still controlled. The price of sugar would necessarily control the grower as to the price that he would receive for his beets.

Mr. Arndt: That is correct, but the grower had a choice of which company he would grow for and a choice of whether he would grow for Crystal that paid this type of bonus or for Holly which paid another type of bonus or Spreckels which paid a third kind or didn't pay a bonus at all. He had a [385] choice of where he would go. He had the choice of whether he would sign a contract.

The Court: Counsel, as I told you several times it is easier to let you go ahead than argue with you. I have been pretty free in admitting evidence in this case but I certainly am not going to be controlled by what happened in 1945.

Mr. Arndt: Unfortunately——

The Court: I am not going to argue with you. That is my ruling. From now on I am going to rule and will not listen to any more argument. I think you are over-playing your hand in that respect.

Q. (By Mr. Arndt): Now, referring to a grower who produced beets during the year 1939 and produced no beets whatsoever during 1940, would he receive any benefit of any increase in price?

A. He had been paid entirely for his beets for the 1939 season according to the contract, and naturally he has no more interest in any sugar. We have bought the beets and paid for the beets according to the sugar

(Testimony of Lester J. Holmes.)

content of those beets at the prevailing average price for the year. May I draw a comparison?

Q. So that your answer than to my question is that he would not benefit by the increase, if any, in the price of sugar? A. That is correct. [386]

Q. And that same answer would be if he grew only in 1940 and didn't grow in 1942, or, pardon me, didn't grow in 1941?

A. That is right. He has been paid entirely for all the beets produced and delivered during that year according to the average price per year by the contract.

Q. And that was based upon the actual sales that took place regardless of what the carry-over might have been? A. That is right.

Q. Now isn't it a fact that during certain years subsequent to 1941, the contract was changed so that the grower did receive a payment based upon the sugar manufactured during the crop year regardless of when sold?

A. I don't quite interpret it that way. During Commodity Credit Corporation period when the Commodity Credit Corporation was in the picture, they issued certain edicts which were beyond the power of the company to determine and all those details I am not familiar with.

The Court: Let me ask this question. As far as Crystal was concerned if there was an increase in price you would get 50 per cent of the benefit of that increase whether the grower got it or some subsequent grower received it, would you not? In other

(Testimony of Lester J. Holmes.)

words, would it make any difference in the profits of your company?

The Witness: No. Well, I will put it this way: All [387] the sugar sold during the calendar year was taken into account and the grower received 50 per cent, approximately 50 per cent of the sales price of the entire amount during that year.

I would like to say this, your Honor, that when we bought those beets at the dump they were our beets. We could take them out and sink them. We could take them—and we did lose a barge. We could take them up to Clarksburg and process them. We could ship them to Oxnard, whichever we felt was the necessary thing to do. The same thing prevailed if a carload of potatoes were sold from Mandeville, it makes no difference to Mandeville whether they go to Texas or Los Angeles or go to alcohol or cattle feed. He has made a sale and we figure the same way on the sugar beets.

The Court: What I am getting at is this. As I understand the method that prevailed during 1937, 1938, 1939, 1940, 1941 and 1942 and maybe after that and maybe before, the sugar that was sold the grower received payment in accordance with the amount of the sugar that was extracted from the beets.

The Witness: Yes.

The Court: Now, there has been some talk here and considerable of it, and the court may have participated in it, that a grower—and you were in court yesterday when we were discussing this——

(Testimony of Lester J. Holmes.)

The Witness: Yes, sir. [388]

The Court: A grower of 500,000 pounds of sugar sold only half of that amount during one year would result in a carry-over.

The Witness: Yes, sir, that is right.

The Court: Now, if the price went up the grower for the year that the sugar was sold in would get the benefit of that increase?

The Witness: On the pro rata of the sales of that year, yes. They would be added into that sales year.

The Court: The grower would get the benefit of 50 per cent of that increase, would he not?

The Witness: The growers growing that year would get the average price of all the sugar. It may not be, when you come down to the average price, it may not be 50 per cent. It may have gone up four bits—yes, the average over the year, the grower would get two bits and the company would get two bits.

The Court: What I am trying to ascertain is this, whether under this system it may have been to the disadvantage of a grower who only produced beets for one year but to the advantage of the company.

The Witness: I don't think it resulted in any advantage to the company whatever.

The Court: You may proceed.

Q. (By Mr. Arndt:) Mr. Holmes, in reply to a question [389] by the court you referred to the calendar year. Didn't you mean the crop year indetermining the return?

(Testimony of Lester J. Holmes.)

Mr. Works: I assumed that.

The Witness: If I did I should have referred to the crop year.

Q. (By Mr. Arndt:) Crop year? A. Yes.

Q. Now then, as I understand it the crop year runs from August 1st to July 31st?

A. That is right.

Q. So that if American Crystal had a certain amount of sugar on hand in July and had to consider whether it would sell that sugar or not, if it sold that sugar in July of 1938 then that sale would be reflected in the return for the 1937 crop, isn't that correct?

A. If it was sold in July of 1938?

Q. Yes. A. Yes.

Q. But if it was not sold until August of 1938 it would then be reflected in the 1938 crop?

A. That is right.

Q. And the accounting for the '38 crop came on between August 1st and August 30th of 1939?

A. The adjustment for payment, yes.

Q. So then the question of whether, for example, the [390] sugar could be sold in the last week of July or the first week of August of a given year would determine two things: First, whether that would be reflected in the one crop year or the other and, second, whether Crystal would pay for that in the following August or August a year later, isn't that correct?

A. That is an accounting practice, yes.

Mr. Arndt: That is all.

(Testimony of Lester J. Holmes.)

Redirect Examination

By Mr. Works:

Q. Mr. Holmes, on this matter of the relationship between the grower and the company, the effect is, is it not, to split the sales cost on an approximately 50-50 basis? A. That is right.

Q. On the other hand the company bears 100 per cent of the manufacturing cost and of the cost of beets, isn't that right? A. That is right.

Q. That comes out of its revenue?

A. That is correct.

Mr. Works: Thank you.

Recross Examination

By Mr. Arndt:

Q. And the grower pays 100 per cent of the growing and harvesting cost on his part? [391]

A. That is right.

Q. Okay.

The Court: That is all.

Mr. Works: Mr. Hayden.

The Court: We will take our morning recess at this time.

(Short recess) [392]

The Court: You may proceed, gentlemen.

Mr. Works: Mr. Hayden, please.

J. B. HAYDEN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

(Testimony of J. B. Hayden.)

The Clerk: Will you state your name, please?

The Witness: J. B. Hayden.

Direct Examination

By Mr. Works:

Q. Where do you reside, Mr. Hayden, please?

A. Denver, Colorado.

Q. What position do you hold with the American Crystal Sugar Company?

A. Executive vice president.

Q. What position did you hold with them during the years 1937 through 1942, please?

A. Eastern sales manager.

Q. What were your duties in that connection?

A. To negotiate the sale of sugar in the eastern area.

Q. You say you were the eastern sales manager. Does that imply there was a western sales manager?

A. Yes, sir.

Q. Who was he? A. M. W. Hardy. [393]

Q. What was his sales territory as compared with your own? Do I understand that there were just the two of you?

A. That is right.

Q. There was no southern manager, or anything of that sort?

A. No.

Q. All right.

The Court: He testified in the deposition as to the five western states so, of necessity, he must have had the balance.

Is that true?

The Witness: That's right, sir, except Mr. Hardy also has charge of western Montana and Idaho.

(Testimony of J. B. Hayden.)

Q. (By Mr. Works:) At that time, was Missoula in operation? A. Yes.

Q. He had three mills in his territory?

A. That's right.

Q. Missoula, Clarksburg, and Oxnard?

A. Yes.

Q. How many mills did you have in your territory? A. I had five.

A. Where were they?

A. At Grand Island, Nebraska; Rocky Ford, Colorado; [394] Mason City, Iowa; Chaska, Minnesota, and East Grand Forks, Minnesota.

Q. Did each of those mills, his as well as yours, have what is known as a normal sales area?

A. Yes, sir.

Q. Will you explain to his Honor what you mean by a normal sales area, please?

A. Well, a normal sales area is that area closest, freightwise, to each factory.

Q. Is it correct to say that it means approximately the distance a mill can sell on a destination basis without absorbing freight?

A. Well, there is some absorption regardless of how close you are. For instance, if you sell from Clarksburg, in San Francisco there is an absorption.

Q. Does that bear a relationship to the cane sugar price base at San Francisco? A. Yes, sir.

Q. What is the inter-relationship, if any, as between cane sugar prices and beet sugar prices? Take San Francisco as an example.

(Testimony of J. B. Hayden.)

A. Well, historically, the cane refiner has established the price on sugar.

Q. That is a point of import for him, is that correct? [395]

A. Yes. He figures the cost to him of his raw sugar and a spread for refining, and establishes the price on that basis.

Q. As far as the domestic use of sugar is concerned, has there been a historical differential as between cane sugar and beet sugar? I am talking now about sales to the housewife for domestic use?

A. Yes.

Q. Can you give us an approximation of what that has been and what it was during these years?

A. Well, it has varied by areas. In the Pacific Coast area, it has generally been 10 cents. In the eastern area, it varied between 10 cents and 20 cents.

Q. Has the competition of the beet sugar people with the cane sugar people in manufacturing uses, such as canning, had any effect upon such a differential?

A. Yes. The cane people have sold sugar to the canning trade and the large manufacturing trade at the same price as beet.

Q. Is it correct to say they have been forced to come down to meet the beet price?

A. Yes. When we established a price, say, 10 cents under the cane price, they reduced their price to that class of trade.

The Court: The housewife, historically speaking,

(Testimony of J. B. Hayden.)

as you [396] gentlemen have been speaking here, has always looked upon cane as preferable.

The Witness: That is right, sir.

Q. (By Mr. Works): Is it correct to say that the normal marketing area of a beet sugar mill is the area within which it receives its highest net price?

A. That is right.

Q. You sell at destination prices, do you not?

A. That is right.

Q. And if you were to sell, say, at Seattle, the destination price at Seattle would be the price base plus freight to Seattle, is that correct?

A. That is right.

Q. So that the total of the price base and freight would be reflected in your gross receipts as being the sales price received, is that correct?

A. That is right.

Q. And the freight——

The Court: Just a moment. Let's see if I understand that. Your base price is based on San Francisco?

The Witness: Well, there is a base price in San Francisco.

The Court: For instance, there is a base price in San Francisco. Does the Seattle man pay the base price in San Francisco plus freight, or do you pay it? [397]

The Witness: He pays it, plus freight. He pays the price at Seattle, plus the freight. We prepay the freight, but it is added to the destination price.

(Testimony of J. B. Hayden.)

The Court: In other words, the party to whom you sell, as the net result, pays the freight?

The Witness: Pays the freight and the price, the destination price.

The Court: So that sugar at Seattle would be higher than it is at San Francisco?

The Witness: That is right. If we sold some sugar in San Francisco, we would pay the freight on it, but we would be unable to add any freight to the cost, but if we sold it in Seattle, we would add the freight from San Francisco in establishing a delivered price.

Mr. Works: There being no question of freight absorption in that setup, your gross receipts would reflect the base plus freight in the top portion of that tabulation we put in yesterday, your Honor, and the freight alone would show in the expense below the line.

Q. Isn't that correct? A. That is right.

Q. But when you get outside of your normal freight area and you encounter prices which competitively are lower than your own base price plus freight, then it becomes necessary, if you are to sell at all, to absorb freight to equalize [398] with the lower price of the competitor, is that correct?

A. It is necessary to meet those competitive conditions in selling sugar.

Q. Is it correct to say that in normal times a mill will sell largely in its own normal sales area?

A. That is correct.

Q. And is it also correct to say that at times when there is an abnormal supply at a given mill, that the

(Testimony of J. B. Hayden.)

tendency from your experience, would be to expand and ship into distant markets?

A. That is correct.

Q. That would result in adding freight, would it not?

A. Yes, sir.

Q. I notice from Exhibit C, in crop year 1938, Clarksburg produced 580,000 odd bags, whereas in crop year 1939, it produced 848,000 odd. In 1940, it produced 826,000 odd, and in 1941, 653,000 odd. Also, I notice from Defendant's Exhibit D that Clarksburg sold in the fiscal year 1938, 390,000 odd bags, and in 1939 it jumped to 816,000 odd bags. In 1940 it receded slightly to 723,000 odd, and in 1941 it jumped again to 1,054,489 bags.

Do those figures indicate to you that during those years there was an abnormal condition of supply of Clarksburg sugar?

A. Yes, sir. [399]

The Court: May I ask, in having these plants in various parts of the country, do you make an effort to increase production over the normal supply of that area, or is it a custom to try to increase production?

The Witness: Well, we try to take sufficient tonnage of beets to operate the plant at an efficient capacity. If you have a normal growing season and the tonnage is normal, we can expect to have a normal crop. If we have a lower sugar content and tonnage, naturally, we do not have the production in that area.

The Court: But I notice the great increase in

(Testimony of J. B. Hayden.)

the production, let us say in this Clarksburg plant. Would that be an effort on the part of the company to expand, or would it be a demand, an unusual demand?

The Witness: Well, it would be an unusual demand for beet acreage and, of course, one of the reasons why our tonnage of production was great is we had an increased yield from the beets grown.

Q. (By Mr. Works): I notice, according to Defendants' Exhibit E, the tons per grower in the Clarksburg district were 1,000,574 in 1938, whereas in 1939 it jumped to 2,000,594 and in 1940 it stayed at about that figure, 2,000,576. From your standpoint as a seller of sugar, would that indicate that there was a bumper crop in beets at the Clarksburg district in 1939 and 1940? [400]

A. Yes.

Q. What correlation is there between yourself as eastern sales manager and Mr. Hardy as western sales manager when a situation of this sort arises?

A. Well, we obtain from our western sales office estimates of the quantities of sugar which can be marketed in the high netting area, say the five western states, and then we make estimates of where that sugar can be shipped to the best advantage in other parts of the country.

Q. Who determines how you shall have this flowing back and forth when you get a surplus in one or more areas, as against possibly normal conditions or even shortages in others?

A. Well, we made estimates on a combined form

(Testimony of J. B. Hayden.)

and submitted them to the president of the company with our recommendations.

Q. Did you make recommendations to him in view of this situation around Clarksburg?

A. Yes, sir.

Q. And what were they?

A. Well, the surplus over and above what the western sales manager reported could be sold, I entered it on my estimate, where it could be marketed to the best advantage.

Q. By surplus, you mean the amount over reasonable calculation of West Coast needs? [401]

A. Right.

Q. Do these shipments to other states shown on Exhibit D for the years 1939, 1940 and 1941, the sales figures, show what was done with that surplus, where it was sold? A. Yes, sir.

Mr. Arndt: Just a moment. I object to the use of the word "surplus." The chart shows the sales that were made and speaks for itself.

Mr. Works: I will accept that.

Q. How often were these estimates made as between Mr. Hardy and yourself?

A. Well, they were made monthly.

Q. On a monthly basis?

A. Yes, sir, and always extended over a period of the crop year.

Q. That is not quite clear to me. You made them on a monthly basis, but did that mean you merely estimated as to the balance of the current crop year?

A. That is right.

(Testimony of J. B. Hayden.)

Q. It was a diminishing——

A. That is right. We attempted to sell all of the sugar from any refinery during a crop year, unless there are some restrictions.

Q. Did Mr. Herman Zitkowski have anything to do with sales of sugar? [402]

A. No, sir.

Q. In addition to this bumper crop situation and over-supply of sugar in the Clarksburg area during 1939, 1940 and 1941, were there any other features which had significance as related to marketing of Clarksburg sugar? I mean starting with August 1, 1939, the commencement of the crop year of 1939.

A. Well, we had the war in Europe. When that started, I believe it was September 1939.

Q. September 1, 1939.

A. We had a very material acceleration in our sales. The demand increased. I believe in the month of September, we invoiced over one million bags of sugar.

Q. That is throughout the United States?

A. Yes.

Q. Do you recall whether or not in September, that same September of 1939, the President made a proclamation lifting all the sugar sales restrictions?

A. Yes. He lifted them for the balance of the year.

Q. What was the effect of the Pearl Harbor attack on December 7, 1941, during the 1941 crop year?

A. Well, it naturally cut off the supplies of raw

(Testimony of J. B. Hayden.)

sugar to the West Coast refineries and resulted in our selling more sugar in the five western states than we had been selling previously. [403]

Q. You refer, I assume, to cane sugar from Hawaii and the Philippines?

A. That is right, and the Philippines.

The Court: Pearl Harbor eliminated one of the main competitors?

Mr. Works: Yes, it did, your Honor.

Q. Subsequent to Pearl Harbor, we all know there were numerous military establishments set up along the Pacific Coast. Did that have any effect on sugar consumption on the West Coast?

A. Yes. As soon as those establishments were—or, as they were being built, well, there was an increase in population. The establishments purchased a lot of sugar from us.

Q. Is it correct to say that all during the period from September 1, 1939, when the war started in Europe, that the canneries were working overtime?

A. Yes. Our canning customers had an accelerated demand for their production, because the price advanced, and they started packing more fruit and more vegetables which required sugar. We had a material increase in our sales to canners during that period.

Q. Was that nationwide? A. Yes.

Q. In early 1942, did you attend a certain meeting or [404] meetings with government officials with reference to shipment of sugar?

A. Yes, in Chicago.

(Testimony of J. B. Hayden.)

Q. Where was it? A. In Chicago.

Q. Will you state to his Honor what took place at such meetings?

The Court: When was that?

Mr. Works: This was shortly after Pearl Harbor, your Honor, early in 1942, I believe.

The Witness: Yes.

Q. (By Mr. Works): Could fix the date any better than that?

A. Well, it was shortly after the first of the year, as I recall, in January. The government officials called us in there for the purpose of advising us of the submarine attacks on boats from the Cuban supply and asked us if we would be willing to ship our sugar to what they called the deficit area, which was east of Chicago.

Q. And did the company comply with that?

A. Yes.

Q. What kind of a freight arrangement developed from that?

A. We were paid on the Chicago net for the sugar.

Q. The government paid the rest? [405]

A. The government paid the freight beyond Chicago.

Q. Prior to that time, on your shipments into the eastern territory, you had been paying the entire freight, is that it? A. That is right.

Q. I notice some shipments to ports on the East Coast—I say ports, but these are states, although I assume Massachusetts means Boston, and New York

(Testimony of J. B. Hayden.)

means New York, doesn't it? A. That is right.

Q. By what method of transportation was that sugar delivered to those seaports?

A. By boat.

Q. Was the rate by boat cheaper than that by rail? A. Oh, very much so.

Q. And did the company on these shipments to eastern points use the cheapest form of transportation available? A. That is right.

Q. To your knowledge, during this period between 1937 and 1942, was there any agreement or understanding that American Crystal Sugar Company would abandon California or West Coast markets in favor of its competitors?

A. Never heard of it.

Q. Did you have occasion, in your capacity as eastern sales manager, to study the behaviour of your competitors, [406] such as Holly and Spreckels, with reference to their efforts to sell sugar?

A. Why, yes. Through our brokers we had information on where they were marketing their sugar, and, of course, we come in competition with our competitors' sugar at all times.

Q. Did you or did you not ascertain that during the same period you were making heavy shipments east, they were making heavy shipments east?

A. Yes, sir.

The Court: Were they in on this conference in Chicago, also?

The Witness: Oh, yes. The government called all the beet sugar companies in.

(Testimony of J. B. Hayden.)

Mr. Works: That was early 1942, your Honor, during the 1941 crop.

Q. Did you ever see or hear anything indicating that there was any such understanding between your company and these other companies with reference to abandoning the California market?

A. No, sir.

Q. If there had been any such agreement or understanding, would or would it not have resulted in some deviations from the normal marketing procedures?

Mr. Arndt: If your Honor please, I object to that as purely a conclusion of this witness. In the second place, we [407] make no claim that they were going to abandon the California market.

Mr. Works: In whole or in part, that is the charge, as I understand it. [408]

The Court: After the war started in Europe was there an accelerated demand for sugar? And if there was why was the price of sugar reduced? And why did the grower get less money?

The Witness: Well, I can recall one situation there in September of 1939. The Government lifted the quotas which resulted in there being more sugar placed on the market because we had quota sales restrictions prior to that time and that resulted in more sugar being offered than could be consumed. Naturally it depressed the price.

Q. (By Mr. Works): How were the price trends during these years? Can you enlighten us, Mr. Hayden?

(Testimony of J. B. Hayden.)

A. I haven't the various moves in the market.

The Court: The Government removed restrictions so as to make sugar more available and to take care of the shortage, didn't it?

The Witness: Yes.

The Court: And the shortage increased the price.

The Witness: It resulted eventually in a lower price.

The Court: You got a better price when working under the quota?

The Witness: That is right. The more sugar that is offered in the trade, why, it has a tendency to reduce the price. Generally speaking in the Chicago-West market there is more sugar produced than can be consumed in that area and [409] it is necessary to ship the sugar east of Chicago.

The Court: That is all.

Q. (By Mr. Works): Mr. Hayden, will you please state whether or not the fact that during 1939, 1940 and 1941 these growers were being paid on a joint net basis had any effect whatever on either the price or the supply or competitive conditions with reference to sugar? A. No, sir.

Q. Did the fact that the growers were being paid in that manner during those years have any effect whatever upon the efficiency of your sales staff or the marketing method which you employed in the selling of sugar?

Mr. Arndt: We object to that question as compound. The question as to the effect on the efficiency calls for a conclusion; the question as to the mar-

(Testimony of J. B. Hayden.)

keting method I do not object to but it is a compound question.

Mr. Works: I will break it up.

Q. (By Mr. Works): First, did it have any effect on the efficiency? That is the language used in the complaint, your Honor.

Mr. Arndt: I am not objecting to it on the ground it is immaterial. I am objecting to it on the ground it calls for a conclusion of this witness.

The Court: A conclusion of somebody is going to be necessary, counsel. This witness is supposed to be schooled in that particular line. [410]

Mr. Arndt: We don't even know if this witness knew anything about the change, knew the change was made, knew when the change was made or knew any of the circumstances regarding it.

The Court: So far you have only made one claim of lack of efficiency and that is in the method of selling. The additional freight paid has been your principal contention.

Mr. Arndt: That is correct, your Honor, and this man has testified that it was the president of the company who determined what sales were to be made outside of the normal territory. He made his recommendations and it was the president of the company who made the determination.

The Court: Objection overruled.

Mr. Works: Will you read the question?

(Testimony of J. B. Hayden.)

(Question read as follows:

“Q. First, did it have any effect on the efficiency? That is the language used in the complaint, your Honor.”)

The Witness: No.

Q. (By Mr. Works): The answer is no?

A. Yes, I said no.

Mr. Works: Thank you. You may cross examine.

Cross Examination

By Mr. Arndt:

Q. When did you first know that the method of paying [411] growers in the Clarksburg district had changed from the net of Clarksburg alone to the joint net of Holly, Spreckels and Crystal?

A. Well, it was some time in recent years, since this litigation started. I didn't know prior to that time.

Q. In other words, during the crop years 1938—pardon me, 1939, 1940 and 1941 you knew nothing about that situation at all? A. That is right.

Q. You hadn't discussed it with anyone connected with the company? A. No.

Q. And you didn't know the reasons for putting it into effect? A. No.

Q. And so when you testified that there was—I will withdraw that. So there was nothing that would call your mind during those years to determine whether that situation had any effect upon the sales department because you didn't know it existed, isn't that correct?

(Testimony of J. B. Hayden.)

A. I didn't know it existed.

Q. Now then, you have referred to——

The Court: That is the best kind of evidence you can have, counsel, that he didn't know it and there was no change in his methods. [412]

Mr. Arndt: It is our position, your Honor, that it was the president, whom I hope they will bring here, Mr. Wilds, who either he or the chairman of the board, who was the man who made the agreement and who was the man who determined these sales and was the man who determined what particular sales were to go elsewhere and he is the man whom I would like to see here.

The Court: Mr. Witness, when you made your recommendations for the absorption of the product in various plants, what was your experience? Did they usually follow your recommendation or was it the ordinary practice to make changes without your recommendation?

The Witness: They were usually followed.

The Court: You say they were generally followed?

The Witness: Generally followed. In fact, we discussed the statement and the president of the company asked me many questions before he would approve of the sales as outlined in my recommendations to be sure that we were obtaining the highest net for our sugar.

Q. (By Mr. Arndt): Now, you have made reference to the San Francisco base price. Now, what other base points were there during those years?

(Testimony of J. B. Hayden.)

A. Well, there was New Orleans and New York, Boston, Philadelphia, Sugarland, Texas.

Q. What was the last name? [413]

A. Sugarland, Texas, a cane refinery located there.

Q. Now then, when sugar was sold in Texas it was sold at Sugarland, Texas price plus freight from Sugarland, Texas, is that correct?

A. Well, not always. There were competitive conditions at times that deviated.

Q. But those competitive conditions might lower but wouldn't increase the price?

A. That is right.

Q. Then when sugar was sold to Illinois for example, what was the base point for that?

A. New Orleans.

Q. So then when sugar was shipped from California to Texas the difference between the freight rate from California to Texas and the freight rate from Sugarland, Texas, to the point of destination was absorbed by the company?

A. That is right.

Q. And when sugar was shipped to Chicago the difference between the freight rate from San Francisco to Chicago and the freight rate from New Orleans to Chicago was absorbed by the company?

A. That is right.

Q. Now, have you seen this document, Exhibit D, geographical distribution of sales of Clarksburg sugar? A. (No answer.) [414]

(Testimony of J. B. Hayden.)

Q. Did you see it while it was being prepared or since? A. No.

Q. Now, do the records of the company contain data so that a similar geographical distribution could be made for each of these same years, for each of the other plants of Crystal? A. Yes.

Mr. Arndt: Mr. Works, would you be willing to furnish us that information in a similar form for each of the other plants?

Mr. Works: Yes, if his Honor feels it would be any assistance.

Mr. Arndt: I think this is incomplete, if the court please, and unless we know what happened in the other plants we would not be able to see where the sugar from the other plants went in connection with this particular plant.

The Court: I am not going to order it, counsel, because I think we have covered enough territory.

Mr. Works: My own thought is it would be of no help because they have their own condition of supply. Where they shipped to would depend on what they had.

Mr. Arndt: For example, if it shows they were shipping into California or California was shipping into their territory that certainly would allow the court to make certain inferences. [415] This witness made a general statement——

The Court: I have this thought in mind. Every time there was a freight absorption that Crystal absorbed, the grower would also absorb one-half of that.

(Testimony of J. B. Hayden.)

Mr. Arndt: That is correct.

The Court: It would be pretty hard for me to infer that they were deliberately cutting down their own profits.

Mr. Arndt: Except for this, your Honor. Suppose the evidence develops that in 1938 Spreckels, for example, had a freight charge of .546 while Crystal had a freight charge of .191, which is one-third thereof—not one-third less but one-third thereof and those are the figures we think we will eventually present to your Honor.

It is our position that what happened was this—that Spreckels with that particular showing was unable to compete with Crystal and Spreckels having a much greater amount of sugar and having cane sugar besides, told Crystal:

“You play with us or else,” and as a result, as your Honor suggested yesterday, Crystal played with them.

Mr. Works: I didn’t understand His Honor suggested that.

The Court: What I meant was that was his theory, that Crystal was forced into line.

Mr. Works: Yes, that is correct.

The Court: By its competitors.

Mr. Works: It was Mr. Arndt’s suggestion and not the [416] court’s.

The Court: Would it be much of a burden to furnish that to counsel? I would like each side to develop its theory.

Mr. Works: That is all right. It won’t be any

(Testimony of J. B. Hayden.)

work for me at all. It will be for Mr. Graham, but I will ask him to undertake it.

The Court: And he will pass it on to some subordinate.

Mr. Works: As they say in the army "before night there will be a private in the guardhouse."

Mr. Arndt: You are referring to Mr. Graham, the witness, and not Mr. Graham, the attorney?

Mr. Works: Yes, Mr. Robert Graham.

Mr. Arndt: That was just for the record, counsel.

Mr. Works: Yes, we are going to try to find out some other matters which might be helpful here, too.

The Court: Counsel, may I ask as a matter of information, is there in any of these exhibits or are you in a position to produce any evidence as to the lowering of the percentage of freight that Spreckels had to pay after the average went into effect? In other words, does it show any effect on their freight charges?

Mr. Arndt: We will show this, your Honor. We will show the joint net freight for the years '39, '40 and '41—we will show Crystal's individual freight for those three years, which will be less than the net, so therefore the Crystal, Holly together must have been higher than Crystal and we [417] can show that particular amount for those particular years.

We will show the effect of the two together combined for those years.

Mr. Works: Are you going to show combined freight rates for Holly and Spreckels?

(Testimony of J. B. Hayden.)

Mr. Arndt: No, no. I said we have the combined for the three, which is already in evidence.

Mr. Works: Combined freight rate for the three.

Mr. Arndt: Yes. We have the one for the Crystal alone. By subtracting that we get the combined for the two. That is all I am saying. That is a subtraction—mere mathematical subtraction.

Mr. Works: I think it is reasonably evident from the close relationship between the joint net and our multiple net for these three years.

The Court: As I stated yesterday or the first day of the trial, the effect of the war in 1942 created an abnormal picture and it is difficult for me to reconcile in my mind a comparison of a war year like 1942 with the year before. This witness has brought it out more clearly than the other witnesses have and we know as a matter of common knowledge that the shipment of sugar from the Pacific was stopped which in effect would create an increased consumption on the Pacific Coast.

On the other hand you have a situation where there was an [418] abnormal production and you had to find an outlet which would mean the seeking of new markets that were further away from your base. So, you have many factors that are going to have to be analyzed.

Mr. Works: Surely.

The Court: And I am willing to receive any data concerning these various factors that you may be able to place before me.

Mr. Works: We will prepare this data which Mr.

(Testimony of J. B. Hayden.)

Arndt is now requesting. And as I say we will endeavor to get some other information which may throw further light on this freight situation.

I was about to say I don't know whether your Honor has compared the joint nets with our single net for these three years but I would venture the statement that they are so close together in each case that probably the freight factor of the other companies wasn't very far from our own because the net result is about the same and the other expenses are pretty constant.

Q. (By Mr. Arndt): Now, Mr. Hayden, this situation with reference to the method of selling sugar, was that the general method used throughout the beet sugar industry in the United States during those years?

A. What do you mean "method"?

Q. Using San Francisco base point and using the [419] seaboard base point on the eastern seaboard and the two gulf points that you referred to.

A. That is right.

Q. So then as I understand it the cane sugar manufacturers set certain seaboard prices and that the beet sugar industry generally sold at 10 cents or from 10 to 20 cents, depending on the portion of the country, below that, and that insofar as the housewife was concerned that difference continued, but insofar as the canners and the large manufacturers who used sugar, the cane manufacturers dropped to the same price as the beet manufacturers?

A. Yes.

(Testimony of J. B. Hayden.)

The Court: That was simply meeting competition, was it not?

The Witness: That is right, sir.

The Court: You were competing with each other for the same market?

The Witness: That is correct.

The Court: If there was a preference given you had to give a price preference in order to meet that competition?

The Witness: That is correct.

Q. (By Mr. Arndt): Now, you have made reference to this one situation in which quotas were lifted. Was there any other particular situation comparable to the lifting of the quotas that you can remember during those years that affected [420] the price?

A. Well, the war conditions during September of 1939—war was declared in Europe and also I believe in 1941 the quota sales—sales quotas were lifted again.

Q. Are there other matters except those?

A. Matters of abnormal conditions.

Q. Abnormal?

A. I can't think of any others.

The Court: Let me ask this question. When the quotas were lifted at the time of the commencement of the war in Europe was that because the sugar refineries had accumulated a suitable surplus?

The Witness: That is right, sir.

The Court: And was that lifting at the request

(Testimony of J. B. Hayden.)

of the refineries in order that they might dispose of their surpluses?

The Witness: Not at the request of the refineries. Of course we had asked the Government to give us increased quotas during that period, otherwise we would have to carry a considerable amount of sugar over into the next operating year and it would finally result in cutting our production down.

The Court: And this was an opportunity to dispose of your surpluses so that you could build up production again?

The Witness: That is right, sir.

Q. (By Mr. Arndt): Now, were these quotas that you [421] referred to, quotas only on sales or were they also quotas on production or both?

A. Quotas I referred to were sales quotas.

Q. And were there any import quotas?

A. You mean sugars allowed to come into this country?

Q. Yes.

A. Yes. The Hawaiian Islands and Philippines, they all had a quota under the Sugar Act of 1937.

Q. And so did Cuba, isn't that correct?

A. That is correct.

Q. And then following the outbreak of war the Cuba import restrictions were removed, too, isn't that correct? A. I believe that is correct.

Q. Now, you referred to a meeting early in 1942. What was the name of that meeting, if it had any name?

A. Well, it was the sugar branch of the United

(Testimony of J. B. Hayden.)

States Department of Agriculture. They had asked us to attend the meeting.

Q. Now, prior to that, in the early part of 1942, was there any time during 1939, '40 or '41 in which sales that were made east of Chicago were sold at the Chicago price?

A. No, not prior to that arrangement with the Government.

Q. So that prior to that time any sales that were made in the eastern territory or the midwestern territory had no reference to the Chicago price?

A. That is right.

Q. Was there a particular boundary line between the territory to which your Denver plant, or your Rocky Ford plant, I mean, shipped westward and the Clarksburg plant could ship eastward, where the freight rates would be about equal?

A. I can't recall Rocky Ford sugar being shipped westward, except to New Mexico and Texas points. That is as far west as we went with Rocky Ford sugar, if I recall.

Q. But Clarksburg sugar was shipped to Colorado? A. It may have been.

Q. Are you familiar with that or not?

A. Well, I don't remember all the figures there.

Q. The court asked you how it happened that the grower got less in 1939, 1940 and 1941 than he did in 1938, and the only matter that you referred to, as I remember, was the lifting of the restrictions. Have you any other explanation besides that?

(Testimony of J. B. Hayden.)

A. Well, there was an increased freight cost during that period.

Q. You don't mean by that that the freight rates went up, do you?

A. No. An increased freight cost in shipping sugar to farther markets.

Q. Are those the only two matters you can point to?

A. Well, I don't know just what the fluctuations in [423] the base price of sugar were during that period. That might reveal why the growers received less.

Mr. Arndt: That is all.

Redirect Examination

By Mr. Works:

Q. This lifting of the quotas on September 11, 1939, by presidential proclamation, did that bear any relation to so-called panic buying at that time?

A. Yes, sir.

Mr. Works: That is all.

(Witness excused.)

The Court: How many more witnesses have you?

Mr. Works: We have just one, your Honor.

The Court: We will take a recess until 2:00 o'clock. Do you think you will be able to finish your evidence this afternoon?

Mr. Arndt: Yes, your Honor. You told us to, and we intend to.

The Court: I know, but I have told you a lot of things you haven't paid any attention to.

(Thereupon, a recess was taken until 2:00 o'clock.) [424]

Los Angeles, California

Friday, February 24, 1950, 2:00 p.m.

The Court: I would like to ask Mr. Holmes a few questions before you put on your next witness.

LESTER J. HOLMES,
heretofore sworn on behalf of the plaintiff, resumed the stand and testified further as follows:

The Court: Mr. Holmes, what is the season in which you run your plant? You don't run it all the time?

The Witness: No; generally from, well, say the first of August to the latter part of December, depending on the crop to be processed.

The Court: What is the capacity of your plant?

The Witness: We are rated at 2,000 tons.

The Court: A day?

The Witness: A day.

The Court: And during the period that you shipped beets to Oxnard was that due to the fact that you had more beets than your plant could handle?

The Witness: That is right. Those three years—I believe I could refresh my memory as to the figures, but those three years were the greatest slicing, average slicing capacity of any period during the time we have operated.

The Court: When you have a contract with a grower at prices based upon beets, it is controlled

(Testimony of Lester J. Holmes.)

by two factors, [425] the sugar content of the beet and the sales price of the sugar.

The Witness: That is right.

The Court: Now, who determines when the beets shall be harvested?

The Witness: When?

The Court: Who determines that?

The Witness: That is a joint arrangement between my agricultural department, myself and the grower as to the condition of the beets—a delivery of beets which will operate the mill at the most efficient capacity.

The Court: Does your agricultural department go around and make tests of the beets to determine whether they have reached their maximum sugar content?

The Witness: Yes; he starts taking samples generally around the first of July.

The Court: I think it was you who testified that in 1943 and 1944 you were starting to give bonuses.

The Witness: In 1942 we gave a bonus for early delivery.

The Court: In order to keep your plant moving and working at capacity you needed beets?

The Witness: That is right, to start with.

The Court: Yes.

The Witness: To start with we had quite a crop—we couldn't move them by rail or barge—we couldn't move them by rail to Oxnard therefore in order to get the harvest under [426]way early, realizing that the growers would have to suffer a little

(Testimony of Lester J. Holmes.)

loss by reason of the beets not being ripe we agreed to give them a bonus to somewhat offset that.

The Court: Do you know what the capacity of the Oxnard plant is?

The Witness: Around 3,000, I think.

The Court: That is the information I was interested in.

Mr. Works: Unless Mr. Arndt has some questions you may step down.

Recross Examination

By Mr. Arndt:

Q. Now, you made reference, Mr. Holmes, to the fact that this early delivery bonus, one of the reasons for that was the beets were not quite ripe. When you say "not quite ripe" you mean they had not reached their full sugar content, is that correct?

A. That is correct.

Q. The same condition of unripeness would apply to early beets in 1938, 1939 and 1940, would it not?

A. To a certain extent. There are some times when your beets may mature early. Sometimes they don't. That is a situation which depends on weather and the time they were planted and quite a few things like that.

Q. Now, isn't it a fact when you and your agricultural [427] department on one side and the grower on the other side differed as to when beets were harvested, your decision controlled?

A. Not 100 per cent. We generally tried to work

(Testimony of Lester J. Holmes.)

out an amicable agreement. Sure, we have our disagreements. [428]

Q. Where you couldn't agree, you controlled it, isn't that right?

A. Theoretically. On the other hand, the grower can stall and we can't force him.

The Court: I have another question. Prior to the 1939 contract, was there considerable competition among the sugar refineries for the different growers?

The Witness: Yes, and that didn't change. That didn't change during the period.

The Court: There was no advantage in the grower changing under your 1939, 1940 and 1941 contract, was there?

The Witness: Yes. There were certain advantages which are not shown in the contract. For instance, we had—for direct delivery to the factory, we paid 30 cents a ton for the first three miles and five cents a ton for each additional mile up to 11 miles. In other words, we gave a 70-cent direct delivery cost where the beets were delivered direct to the factory. However, that did not apply to Mandeville because we bought the beets at Mandeville on the dump and transported them either to the factory or to Oxnard.

The Court: Now, for instance, take Mandeville. As long as the price that they were going to receive for their beets was the same, whether they were delivered to you or Spreckels or Holly, it didn't make any difference to them, did it? You know of no advantage to them one way or the other? [429]

(Testimony of Lester J. Holmes.)

The Witness: There was a slight difference in the contract, even using the same joint net. There would be a slight difference in the contract. You might say it was immaterial, but there was a slight difference in the contract. In some cases, low sugar content beets brought more, I think, with Holly and Spreckels than they did with us. In one or two cases, with the higher sugar content, we paid a few cents more a ton.

The Court: You mean to tell me that during these three years in dispute here, that the sugar refineries were still competing among themselves for growers?

The Witness: I think I can safely say if we wanted a grower, we went after him.

The Court: Did you lose any growers during that period?

The Witness: I don't think so.

The Court: Did you gain any?

The Witness: Yes.

The Court: Were those growers some that were immediately adjacent to your plant?

The Witness: Yes, and I think we picked up some on Sherman Island, which is about halfway between Clarksburg and American Island, where we were operating.

The Court: Was that handled by more favorable financial arrangements? Was that the means you [430] had of getting a grower?

The Witness: I wouldn't say financial. I don't believe the financing of those growers—we did very little financing during that period. But some grow-

(Testimony of Lester J. Holmes.)

ers would say we had better seed. We thought maybe we had a little better seed. We had what we thought was a little better agricultural department. Probably the other people said theirs was better, too.

The Court: You will always find among growers some that think they can get a better deal other places, even if they can't, isn't that right?

The Witness: That's right.

The Court: There is always a certain amount of change due to that.

The Witness: There are certain growers that would have no dealings with me at all, and they very plainly told me so. They would grow for another company, even though our contract was the best.

The Court: That's all I have.

Q. (By Mr. Arndt): Isn't it true that during the years 1938, 1939 and 1941, Mandeville and Zuckerman were the only growers you had in San Joaquin County?

Mr. Works: I did not hear that.

(The question was read by the reporter.)

The Witness: Actually growing, we had a contract in [431] Quinby Island, which I believe is in San Joaquin County, and they were flooded at the same time Mandeville was, and we did not renew that contract.

Q. (By Mr. Arndt): Mr. Zuckerman tells me Quinby is in Contra Costa County.

(Testimony of Lester J. Holmes)

Mr. Works: We will accept that stipulation if it is offered. I don't know.

The Witness: I thought it was in San Joaquin.

The Court: I don't know what materiality it has, anyway.

Mr. Arndt: That is all. Thank you.

The Witness: That is all.

(Witness excused.)

Mr. Works: Mr. Hardy.

M. W. HARDY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: M. W. Hardy.

Direct Examination

By Mr. Works:

Q. Where do you live, Mr. Hardy, please?

A. Orinda, California.

Q. What is your business or occupation?

A. Western sales manager for American Crystal Sugar. [432]

The Court: A big man like you should be able to speak up so we can hear you.

Q. (By Mr. Works): How long have you been with them, Mr. Hardy, in that capacity?

A. Since 1937, I believe, or 1938.

Q. How long have you been associated with the sugar business overall? A. Since 1920.

(Testimony of M. W. Hardy.)

Q. What are your duties as West Coast sales manager?

A. Supervision of sales in the five western states, in addition to western Montana, through brokers and our own organization.

Q. The five western states are the normal sales area over which you have jurisdiction?

A. Yes.

Q. According to Defendants' Exhibit C, you had a rather heavy production of sugar beets in California in the year 1939-1940 and to a somewhat less extent in 1941. Does that mean that during that period you had a surplus inventory, as far as Clarksburg is concerned? I was giving you Clarksburg figures.

A. Yes.

Q. During that period, 1939, 1940 and 1941, were you in the habit of making reports and sales estimates to your home office in Denver? [433]

A. Yes.

Q. And did you report the fact of that surplus inventory to them in Denver?

A. Yes.

Q. Just how were these reports and estimates submitted to them?

A. They were prepared in detail by customers as to the amount of sugar you could sell to each customer for the month following, and for the 11 months following that.

Q. In making out the estimates, was it or was it not your practice to allow yourself a reasonable cushion over and above sales requirements?

(Testimony of M. W. Hardy.)

A. Well, you always really are optimistic on what you are going to sell, sometimes a little overly so.

The Court: You have to be optimistic to be a salesman, don't you?

The Witness: I think so.

Q. (By Mr. Works): Was there any time during these three years, 1939, 1940 and 1941, when you were not permitted by Denver to sell all the Clarksburg sugar in your sales area that you could sell?

A. Not during that period.

Q. During that period, were you ever instructed to cut down sales in your territory?

A. No. It was just the reverse. We had a surplus. [434] They were prodding me all the time to sell more.

Q. Was there any time during that period when you did not have sufficient sugar on hand to satisfy marketing needs, and I am referring to Clarksburg sugar? A. No.

Q. Do you also have in charge the sales of molasses in your district?

A. For the Clarksburg factory, to customers alone. The balance of the molasses that I don't sell is sold elsewhere.

Q. I just want to ask how much time per year do you spend on the sale of molasses?

A. That is on a yearly contract. It only takes a few minutes, you might say, to consummate the contract, and get it signed. [435]

Q. Now, according to Defendant's Exhibit C

(Testimony of M. W. Hardy.)

your sales in Northern California jumped from 267,000-odd bags in the crop year 1939, to 314,000 in the crop year 1940. Then, too, 516,000-odd bags in the crop year 1941.

Can you tell his Honor the reasons for those jumps in deliveries in Northern California?

A. Well, in 1939, at the beginning of the second world war, there was a big hysteria developed about that time mainly, I believe, due to experience in the shortage of sugar in the first world war and there was quite a little hoarding.

Then there was in 1940, I believe that was the year that—wasn't that the year the restrictions were lifted? They were lifted in 1939.

Q. The fall of 1939?

A. And there was increased sales to canners. There was a large demand for export canned goods—largely canned goods that take considerable sugar. It was packed in a heavy syrup and where prior to the second world war there was very little export other than what they term "water pack", so a greater amount of sugar was used by the canners at that time. And also there may have been in that time some interruptions due to strikes and what-not. I don't recall that. It may temporarily have increased our sales.

Q. Now, you mentioned this canning situation. Did that become accelerated after the outbreak of the world war in [436] Europe in September, 1939?

A. Oh, yes.

(Testimony of M. W. Hardy.)

Q. And then was it accentuated still further after Pearl Harbor?

A. Well, after Pearl Harbor—of course there was a shortage temporarily of off-shore sugars which naturally drew more on the supplies we had.

We had abnormal sales, you might say, for a period of time due to Pearl Harbor and the loss of the Philippines.

Q. By "off-shore" you mean Hawaiian and Philippine sugar mainly? A. Cane, yes.

Q. That improved the market for beet sugar in California? A. Yes.

Q. Do you attribute the jump to 516,000 odd bags in the crop year 1941 to that?

A. I would say that was the major reason.

Q. Bearing in mind that the crop year 1941 extended to July 31st, 1942? A. Yes.

The Court: May I ask, do you work on a straight salary or salary and commission?

The Witness: Straight salary.

The Court: Doesn't make any difference to you?

The Witness: No, it has no bearing on it at all.

Q. (By Mr. Works): To your knowledge during these years or affecting these years was there any kind of an agreement between sugar companies limiting or tending to limit sales in California or elsewhere in your sales territory?

Mr. Arndt: Just a minute, if the court please. I object to that as no proper foundation laid as to what he knows about any agreement between the

(Testimony of M. W. Hardy.)

sugar companies or if he was present when an agreement was made or knows about an agreement.

The Court: I think he can answer as to whether he knows anything about it.

Mr. Works: That is all I am asking.

Mr. Arndt: He asked if there was such an agreement.

The Court: He asked if he had knowledge of such an agreement.

Mr. Arndt: Pardon me. If that is what he said that is all right.

The Witness: No, I do not.

Q. (By Mr. Works): Did you in the course of your activities see or hear anything to indicate the existence of any such agreement or understanding?

A. No.

Q. Is it or is it not the fact that at all times during those three years you endeavored to sell all the sugar you [438] could in your sales territory including California? A. That is right.

Q. From your experience is it or is it not the fact that this situation where the beet growers were paid on a joint net during 1939, 1940 and 1941 had no effect whatever on either price or supply or competitive conditions with reference to sugar?

A. As a matter of fact I didn't know it was in effect.

Q. The joint net? A. No.

Q. Now, did the utilization of this joint net during those years, so far as you were able to observe, bring about any change whatever in your territory

(Testimony of M. W. Hardy.)

either in marking method or efficiency in the sale of sugar? A. No.

Mr. Works: You may cross examine.

Cross Examination

By Mr. Arndt:

Q. Now, isn't it a fact, Mr. Hardy, that during the crop year 1939 sales in Northern California fell off while production went up?

A. I don't have those figures before me.

Q. You have no recollection of what occurred during that year?

A. Of what the sales were? [439]

Q. As to whether the sales went up or down during the crop year of 1939.

A. Compared to what year?

Q. The prior crop year.

A. To 1938? Well, I don't recall that.

Mr. Works: You say production went up while sales went down in 1939?

The Witness: I don't have the figures in mind.

The Court: That is a matter of mathematics to be gotten from the record, isn't it, counsel?

Q. (By Mr. Arndt): I will call your attention to Exhibit C, which shows from the crop year 1938 to the crop year 1939 the production at Clarksburg. It rose from 580,431 hundred pound units to 848,706 while deliveries dropped from 278,730 to 267,508. Have you any explanation of that?

A. We probably lost a customer that bought 20,000 bags a year. It might have been more than one customer.

(Testimony of M. W. Hardy.)

Q. Now isn't it a fact, Mr. Hardy, that when sales of California sugar were made outside of the western territory the first thing you knew about it was when you and your office received a report that the sale had been made?

A. That is right. The first time I would know the actual shipment being made was when I received a copy of the report of the shipment, but that shipment would be against the surplus that I had shown in a previous estimate. [440]

Mr. Arndt: I move to strike out as not responsive everything beginning with the word "but".

The Court: I will deny the motion. I want all the information I can get.

As I understand it you were never ordered to ship out of your territory sugar that you had allotted to your territory?

The Witness: That is right.

Q. (By Mr. Arndt): Isn't it a fact that allotments were at times made and the allotments were changed?

A. Not during the period in question.

Q. You mean it didn't occur at all during the crop year 1939 or 1940 or 1941? A. No.

Q. And insofar as the price at which you sold, was that the San Francisco base price plus freight as the minimum price which you could sell unless you had specific instructions to the contrary from Denver?

A. The price at which it was sold would be the delivered competitive price at any destination. It

(Testimony of M. W. Hardy.)

may equal the price, the base price at San Francisco plus the freight and it may be less.

Q. But your general authority was that you could sell at the San Francisco price plus freight or more without any specific instructions to the contrary but if you wanted to sell for less you had to get instructions from Denver? [441]

A. That is right.

Q. And then you reported directly to the president, isn't that correct?

A. That is right.

Q. Now, referring to the sale of molasses from the Oxnard plant. Did you have anything to do with that? A. No.

Q. In connection with the sale of beet pulp, the moistened beet pulp, did you have anything to do with that? A. No.

Q. Who handled that?

A. I really couldn't say who handled that.

The Court: Don't you know?

The Witness: Well, it was someone in the operating or agricultural department. I don't know who or which department would handle it.

Mr. Works: That is mostly for cattle feed, your Honor.

The Court: Well, human beings have to be fed the same as cattle.

Mr. Works: I will be glad to find out for you.

Mr. Arndt: That is all.

The Court: May I ask counsel, is there among the exhibits through these various years the price of

sugar—for instance from 1938 to 1943 or '44, the price that was received for sugar? [442]

I have in mind this thought as to what you are trying to develop. Prices may have varied. In other words, in 1938 the price of sugar was high. That being so would the grower of the beets get more money. I was wondering if there had been any chart made showing the relation between the amounts that the growers had received for their beets and the price of sugar as it varied from year to year?

Mr. Works: No, and one reason was that we understood that Mr. Arndt's attack was leveled at our freight deductions in the table.

Another reason, your Honor,—well, we will do the best we can. You have these base prices at several points around the country—

The Court: For instance, the Clarksburg plant during these years must have received a certain average price for their sugar.

Mr. Works: I can figure that, your Honor.

The Court: Now, how did that compare with the amount that the grower received?

Mr. Works: We have our broken down gross receipts, your Honor. It seems to me that covers it.

The Court: I don't know whether that is in the record or not.

Mr. Arndt: I have the figures and I intend to present them in my final brief, the percentages.

The Court: Then they are in the record. [443]

Mr. Arndt: The figures are in the record from which I will present these various percentages and

I will show what the situation was as far as they were concerned.

Mr. Works: Exhibit G and H for instance cover '37, '38 and '42 and they show the gross receipts from sales less cash discounts and allowances. It is broken down in hundredweights. That is the top figure in each of these exhibits. I think that is what your Honor has in mind.

The Court: That is what I have in mind.

Mr. Works: Then it is in the record.

Mr. Arndt: I intend to present to your Honor this broken down into percentages for those particular years and they will tell a very interesting story.

Mr. Works: Do you have any questions of this witness?

Mr. Arndt: No, I am all through.

The Court: You may step aside.

Mr. Works: Now, inasmuch as Mr. Arndt has requested information as to all of our mills, we will renew our offer of the exhibit which we were discussing yesterday and which shows the effect of these federal quotas upon our total production.

The Court: Any objection?

Mr. Arndt: The only objection I make is the objection I made before, and that is I asked for this information and it was denied me in the interrogatories and now they are putting [444] it in.

The Court: You asked a question this morning and I am still uncertain as to whether it is material. You asked for certain information this morning and I thought it was going to help you develop one of

the theories of your case, but if you are going into other plants I think they are entitled to show what effect it had. On the other hand if you abandon your other question and request for information I will deny admission of this.

Mr. Arndt: I will withdraw the objection.

The Court: It will be admitted next in order.

The Clerk: Defendant's Exhibit J.

(The document referred to was marked Defendant's Exhibit J and received in evidence.)

Mr. Works: Mr. Arndt heretofore favored us with various estimates of his idea of the measure of damages. May I submit this table of the differential between the single and the joint nets for the three years in question, your Honor?

The Court: As an exhibit, you mean?

Mr. Works: Well, I suppose so.

Mr. Arndt: I didn't submit mine as an exhibit. I submitted mine as part of a brief.

Mr. Works: All right. May we get it to your Honor in some appropriate form?

The Court: It is argument, really, isn't it? It is not evidence. It is argument.

Mr. Works: It is a computation, yes, which would follow argument.

The Court: Are the figures in on which you can base that?

Mr. Arndt: Yes, they are.

Mr. Works: Yes.

The Court: You might as well put it in the same

way as he is putting his guesses in. You might as well do some guessing, too.

Mr. Works: Shall we simply lodge it with the clerk and have it marked, or how shall we do it, your Honor?

The Court: Submit it with your brief.

Mr. Works: All right. [446]

Mr. Arndt: Counsel, for the purpose of identification in the case, I want to refer to it, so I will simply refer to it as your calculation as to damages.

The Court: Counsel, why don't you do this? Why don't you stipulate it may be marked for identification and you can refer to it?

Mr. Arndt: All right.

Mr. Works: As an exhibit for identification only. May I have this marked, then?

The Clerk: Exhibit K for identification.

(The document referred to was marked as Defendant's Exhibit K for identification.)

Mr. Works: The defendant rests.

I understand Mr. Arndt has been talking about further stipulations, which is entirely satisfactory with us, but perhaps we should technically leave the case open for that purpose.

The Court: I will give you both a wide open gate.

Mr. Works: I did not know whether your Honor wanted to think about some time limit or should we leave it open?

The Court: I don't think it should be left open indefinitely.

Mr. Works: I think there should be a time limit.

Mr. Arndt: May I make a suggestion in that regard?

Mr. Works: Surely. [447]

Mr. Arndt: That we have it continued to some law and motion day, and by that time we will have our stipulations in, and the court can order it submitted and allow a certain time to file our briefs.

The Court: How long do you want to submit that additional information?

Mr. Arndt: It is simply a question of how long it will take to check up certain things. Insofar as mine is concerned, I have the data to present to Mr. Works. He may have to check it up. That shouldn't take more than a week, I think. We ought to have it in a week from today.

Mr. Works: Well, our most arduous task is to have our man go back to Denver and make the calculations for all the other mills. I don't know how long it would take.

The Court: Suppose we make it three weeks from Monday.

Mr. Arndt: Yes.

Mr. Works: All right.

The Court: I will set it for law and motion at 10:00 o'clock, and you can submit any additional stipulations or facts.

Mr. Arndt: If the court please, I have one matter yet to present today, and that is my statement as to attorney fees. That is the only other thing I have before the case is closed today.

The Court: I expected to hear something about that. [448]

Mr. Arndt: We have filed out time records. That is complete, with the exception of the matters that occurred before the District Court in Colorado, as of which we have submitted a transcript as to the work that was done in Colorado. We selected Colorado counsel, who appeared there, and we paid them \$300 for their services in that connection.

Mr. Works: We will accept that stipulation.

Mr. Arndt: That money was actually paid.

Mr. Works: I say we will accept the statement.

Mr. Arndt: The rest of the services were performed primarily by myself, with the exception of whatever is shown in the statement where some other persons appeared. Wherever appears the initials S. A. or S. M. A., those services were rendered by myself. The time kept is complete, except for the trial itself, and the day before the trial, and Wednesday, which was over 3,000 hours.

I was admitted to the Bar of the State of California in 1920 and have been a member of the Bar ever since. I was admitted to the District Court in the Northern District of California in 1920, and in the Southern District in 1931.

In my opinion, my services are reasonably worth \$30 an hour, and that is the current rate that I charge.

Mr. Works: The total time is how many hours?

Mr. Arndt: A little over 3,000 hours.

Mr. Works: I thought I saw something about a request [449] for a \$30,000 allowance in some paper.

Mr. Arndt: We were asked to state what our maximum allowance would be, and we said \$30,000.

This comes to approximately \$24,000 or \$25,000.

Mr. Works: We make no issue at all as to the amount of work Mr. Arndt has done on this case. It is considerable. One of the things for your Honor to determine, I assume, is how much of it was necessary.

We also feel that the amount of recovery should be affected considerably, that is, the amount of attorney fees, should be affected considerably by the amount of the ultimate judgment, which may or may not be recovered by the plaintiff.

The Court: I know an attorney is always in an embarrassing position when he is asked to pass upon an attorney fee. We all know this has been a long, arduous case, in the way of preparation.

Mr. Works: No question about it.

The Court: If you gentlemen don't already know it, I am still a country lawyer, and I don't look at large attorney fees with very much favor, because where I came from and practiced law, we didn't get them. I am not very strong in allowing large attorney fees. I think the factors that you have mentioned should be taken into consideration.

Now, I would like to ask you, Mr. Works, outside of the element of damages, what material allegations in the complaint [450] do you contend that the plaintiff has not proved? Is that too broad a question?

Mr. Works: No, I don't think so.

The Court: The reason I am asking that question is this. You have contended that they have to prove all the material allegations in the complaint.

I have this thought in mind. The Supreme Court held that the material allegations of the complaint stated a cause of action. That is the law of the case.

Mr. Works: Yes, no question about that.

The Court: I am wondering what you contend now are the factors they have not proven.

Mr. Works: You and I, your Honor, have had a slight difference on the question of the effect upon interstate commerce. You want me to state our position. I will do it very frankly. The only evidence in this record I can see which affects the sugar in the interstate commerce situation, that is the question of the consumer of sugar in interstate commerce, and he is the fellow the Sherman Act is designed to protect, the only evidence in this record was given today on that issue. That was that this understanding or agreement with reference to the beets had no effect upon price, supply, or competitive conditions with reference to sugar in interstate commerce. I am not asking your Honor to agree with me at this point, but I am stating that, and we would like to [451] discuss that matter in the brief.

The Court: The thought that I have in mind is this. Of course, I agreed with you originally that beets did not affect interstate commerce. The Supreme Court held otherwise.

Mr. Works: It was alleged that there was a restraint upon sugar, the only interstate product, and Justice Rutledge took that as true on page 246 of the opinion. I have that right here, your Honor, if you care to look at it.

The Court: No. This is a kind of a free-for-all

discussion, because I know it will be a long time before the briefs are all in. I think about these things in the meantime. So I am trying to orient this case in my own mind.

Then, outside of the element of damages, it is your contention that the growing and selling of beets has no effect upon interstate commerce?

Mr. Works: I would make it a little broader than that, I think, your Honor, that this joint net setup had no effect upon the price, supply or competitive conditions with reference to sugar, which is the interstate product. The Supreme Court opinion certainly holds that. Therefore, while they may have proven a Cartwright Act conspiracy, where you don't need interstate——

The Court: At the time this suit was filed, the Cartwright Act was considered unconstitutional.

Mr. Arndt: That is right.

Mr. Works: I think Justice Treanor is the only one who thinks it is constitutional now.

The Court: I don't know exactly how to say it. I felt that that decision brought this down to more or less a question of the amount of damages. I realize there has been considerable testimony here from officers of the company, but I haven't found any explanation, at least a satisfactory explanation, for their change of method.

I read the president's explanation in the deposition during the noon hour. If I recall correctly, his explanation was it was to keep the growers from switching around from place to place; in other words, keep a stabilized group of growers which they

could depend upon as a source of beets. Now, that was stifling competition. That kind of an agreement, you can't get away from it, is stifling competition.

As a practical matter, the grower might have a choice of where he wanted to sell. Mr. Holmes testified that he might like some foreman or some superintendent of a plant better than another, but as far as the price is concerned, there was no advantage in switching around.

Mr. Works: I don't think I am at great variance with what your Honor says.

The Court: Then if they stifled competition, it was an advantage, the change, because they brought it about, the refiners, [453] they adopted the change of method here. Probably they found it working successfully in other places and thought they would try it here. But it was an advantage to them to change that contract, and if it was an advantage to them, to the refiners, then it would have to be at the expense of the growers.

Mr. Works: We are willing to concede, I think, and we always have, your Honor, that certainly the growers were deprived of the advantage of the single net of the most efficient company in each year. That means the difference between, let us say, the Crystal single net in 1939, 1940 and 1941, and the joint net. In one year we were below the joint net. In the other two years, we were a little bit above it, not very much. Certainly, they were deprived of that. As I said on the first day of this trial, that is one thing that does stick out all over this case, as a result of this joint net arrangement. They were deprived of

the advantages of the most efficient operator, which is measured in terms of the difference between the single and multiple net, unless they prove additional damages, and it is our view that they have not. I think it comes down to that on the question of damages.

The Court: Of course, outside of that angle, I am going to have to read the briefs and the various exhibits, but in briefing this case, I don't want you gentlemen to do like they [454] did in the last case I had. The briefs were as long as the transcript in the last case I had here.

In briefing this, I would like you to take enough time to do a good job in briefing, and not just see how much you can throw at me.

Mr. Works: Like the man who took the time to write a short letter?

The Court: Yes. Like saying the best extemporaneous speech is made after many hours of study, and the best briefs are some times that way. I don't want to have briefs that are twice as long as the transcript. In other words, I want you to boil your briefs down.

Mr. Works: I will certainly cooperate in that. We intend, your Honor, simply to state our views on this effect on interstate commerce, cite the cases, and let your Honor decide the question as you see fit. We will want to analyze the evidence considerably from the standpoint of damages. When I say considerably, I don't mean at horrible length, either.

There is still another issue. That is the issue of *pari delicto*, and we are going to submit that to your

Honor on the authorities heretofore presented to you. Your Honor knows more about this co-conspirator case than any of us.

The Court: I think the Supreme Court disregarded that and by their silence eliminated it. I don't think you'd better waste any time on that. I tell you frankly, I thought I [455] had something there at the time. Apparently, the court did not think anything of it, and the facts here indicate that relationship was such that they didn't have much choice. I don't think that could be relied upon here, if it can be relied upon at all in this type of case. I don't know. They seem to think that the companies that entered into these arrangements are free agents and the people that they deal with, that entered into these unlawful contracts, are free from any taint of responsibility.

Mr. Works: I wonder if we could do this, simply preserve the point and set it out in the authorities and not discuss it at all.

The Court: As far as I am concerned, there is no use in your wasting any paper on that, in arguing that point. But I am interested in the point as to the effect on interstate commerce, if any, and also the elements of damages.

It seems to me that I am a whole lot in the position of a jury after listening to the case, and that is, I find that if they are entitled to any damages, what are the figures?

Mr. Works: I think the cases give a pretty good indication of what the measures are. It seems to me that in this type of case, damages have to be proven

as a fact. The only thing is you are entitled to take a reasonable standard.

The Court: The difficulty of proving the damages is on the plaintiff. [456]

Mr. Works: That is right.

The Court: I also realize that in these various cases of this type that are submitted to juries, that the Supreme Court has upheld their verdicts, and sometimes it is very hard and difficult to understand how they arrived at the figure.

Mr. Works: Well, we would like to analyze those leading cases. We are all familiar with them. They have all been cited.

The Court: In other words, I used this expression before, that this is not the only reversal I have had, but you are asking me to look in a crystal ball and find what would have happened if these contracts hadn't been entered into. [457]

The Court: Then multiply it by three.

Mr. Works: Well, they had that same situation in the lawsuit involving Macey's which we cited to your Honor. There they were shut out of the market and they went ahead and figured the damages on the basis of what would have happened if they had gone on.

The Court: Let us have an understanding that after this case is submitted as to the length of time you want for briefs.

I want to say frankly I have plenty of briefs on my desk right now without rushing anybody, but when I take a case under submission I don't hold the briefs until they are all in. I start in with the first

brief that is filed and then follow it through and I try to be ready for the next brief.

I am perfectly willing to give you gentlemen any reasonable time that you can agree upon but I will tell you if you send in any voluminous briefs I will probably send them back to you.

Mr. Arndt: The Circuit Court of Appeals has a limit on the size of briefs.

The Court: We are dealing with a different problem than the appellate court. We are making a record for the appellate court. We are doing the ground work and we have the factual angle whereas as a rule the reviewing court does [458] not have to concern themselves a great deal about that.

Mr. Arndt: When I filed my brief in this case I thought I had it within the appellate court's limitation but when it came from the printer they called me up and said it was one page over, so I had to file a document asking leave to file one extra page and it was granted, but I thought I had it within the limits.

Mr. Works: It would have been simpler to take two paragraphs out of your brief.

Mr. Arndt: That was the last day.

Mr. Works: I would like to hear Mr. Arndt's thoughts.

The Court: How long do you want for your opening brief, Mr. Arndt, after submission of the case?

Mr. Arndt: Let us say 30 days.

Mr. Works: 30, 30 and 20 and if anybody gets into trouble the other side will be merciful, is that agreeable?

Mr. Arndt: That is correct.

The Court: And if the other side is not merciful I will be.

On March 20 it will just be the submitting of this matter at that time and if you have anything prepared before that time bring it in and we will take care of it.

I will say this to counsel, that I have appreciated the manner in which both sides have presented their case. And while at times it may have looked like some people were not [459] altogether cooperative, it seems to me the fact that we have been able to try this case in only three days does reflect a lot of cooperation and a lot of effort on the part of both sides and I have appreciated counsels' attitude in the matter.

Mr. Works: Thank you very much.

The Court: I think you are both a credit to your clients.

Mr. Works: We have appreciated your Honor's courtesy and patience.

(Whereupon, at 3:00 o'clock p.m. the above entitled matter was concluded.) [460]

[Endorsed]: Filed May 4, 1951.

Los Angeles, California

Thursday, February 23, 1950

INTERROGATORIES AND ANSWERS
THERE TO

Interrogatory No. 1

Set forth the names and places of residence of each officer of Crystal from January 1, 1937 to the date upon which these interrogatories are answered and state the office or offices held by each during said period:

Answer to Interrogatory No. 1

January 1, 1937 to December 20, 1948

Title and Name	From	To
Chairman of the Board		
C. K. Boettcher.....	Jan. 1, 1937	Dec. 20, 1948
Vice-Chairman of the Board		
W. N. Wilds.....	Jan. 1, 1937	Dec. 20, 1948
President		
W. N. Wilds.....	Jan. 1, 1937	Dec. 20, 1948
Vice Presidents		
H. E. Zitkowski.....	Jan. 1, 1937	Dec. 20, 1948
J. B. Grant.....	Jan. 1, 1937	May 20, 1947
J. B. Hayden.....	July 26, 1946	Dec. 20, 1948
Secretary		
W. E. Kraybill.....	Jan. 1, 1937	Dec. 20, 1948
Assistant Secretaries		
J. B. Hayden.....	Jan. 1, 1937	Dec. 20, 1948
J. A. Summerton.....	Jan. 1, 1937	Dec. 20, 1948
C. L. Allen.....	Jan. 1, 1937	Mar. 10, 1944
H. von Bergen.....	Aug. 6, 1948	Dec. 20, 1948
Treasurer		
W. E. Kraybill.....	Jan. 1, 1937	Dec. 20, 1948

Title and Name	From	To
Assistant Treasurers		
J. B. Hayden.....	Jan. 1, 1937	Dec. 20, 1948
J. A. Summerton.....	Jan. 1, 1937	Dec. 20, 1948
C. L. Allen.....	Jan. 1, 1937	Mar. 10, 1944
H. von Bergen.....	Aug. 6, 1948	Dec. 20, 1948
General Counsel		
J. B. Grant.....	Jan. 1, 1937	May 20, 1947
M. A. Lewis.....	Aug. 4, 1947	Dec. 20, 1948
Comptroller		
J. A. Summerton.....	Aug. 4, 1947	Dec. 20, 1948
Auditors		
R. H. Graham.....	Jan. 1, 1937	Nov. 30, 1947
E. E. Merrill.....	Dec. 1, 1947	Dec. 20, 1948

The place of residence of the above named individuals during the periods shown was Denver, Colorado.

Interrogatory No. 3

Par. 5 of the 1939, 1940 and 1941 contracts between Crystal and growers of sugar beets in California north of the 36th parallel refers to "the average net returns . . . received for sugar manufactured at beet sugar factories located in California north of the 36th parallel." State the location of each such factory and the name of the company operating it during each of said cropping years. [2]

Answer to Interrogatory No. 3

Clarksburg, California — Operated by American Crystal Sugar Company.

Alvarado, California; Tracy, California; Hamilton City, California—Operated by Holly Sugar Corporation.

Spreckels, California; Manteca, California; Woodland, California — Operated by Spreckels Sugar Company.

Interrogatory No. 4

Were there any other beet sugar factories located in California north of the 36th parallel during the cropping years of 1939, 1940 and 1941 and if so where were they located and by whom operated?

Answer to Interrogatory No. 4

There were no beet sugar factories located in California north of the 36th parallel during the cropping years of 1939, 1940 and 1941 except as stated in the Answer to Interrogatory 3. (Reporter's note: Original No. 3 deleted by counsel.)

Interrogatory No. 5-B

Set forth the amount of manufactured sugar that Crystal had on hand in California north of the 36th parallel. [3]

(b) August 1, 1939.

(c) August 1, 1940.

(d) August 1, 1941.

Answer to Interrogatory No. 5-B

(b) 287,123 one hundred pound units

(c) 271,570 one hundred pound units

(d) 330,044 one hundred pound units

Interrogatory No. 5-C

Give the information requested in item 4(b) as to the amount of manufactured sugar that Crystal had on hand that had been manufactured in Crystal's factory north of the 36th parallel in California.

Answer to Interrogatory No. 5-C

- (a) 139,233 one hundred pound units
- (b) 329,279 one hundred pound units
- (c) 361,424 one hundred pound units
- (d) 464,549 one hundred pound units
- (e) 64,032 one hundred pound units
- (f) 54,794 one hundred pound units

Interrogatory No. 6-B

State the amount of sugar in process of manufacture and not yet manufactured that Crystal had on hand at Crystal's factory north of the 36th parallel in California:

- (a) August 1, 1938;
- (b) August 1, 1939;
- (c) August 1, 1940; [4]
- (d) August 1, 1941;
- (e) August 1, 1942;
- (f) August 1, 1943.

Answer to Interrogatory No. 6-B

Crystal's factory north of the 36th parallel in California was not in operation on any of the dates specified in Interrogatory "6-A;" consequently, there was no sugar in process of manufacture at said factory on any of the said dates.

Interrogatory No. 7-B

Set forth the amount of sugar beets not in process of manufacture that Crystal had on hand in California north of the 36th parallel.

- (a) August 1, 1938;
- (b) August 1, 1939;
- (c) August 1, 1940;
- (d) August 1, 1941;
- (e) August 1, 1942;
- (f) August 1, 1943.

Answer to Interrogatory No. 7-B

Sugar beets not in process of manufacture on hand at American Crystal Sugar Company's factory north of the 36th parallel: [5]

At opening of business	Tons of Sugar Beets
August 1, 1938.....	None
August 1, 1939.....	None
August 1, 1940.....	None
August 1, 1941.....	None
August 1, 1942.....	1,512
August 1, 1943.....	None

Interrogatory No. 8-B

Set forth the tonnage of sugar beets manufactured into sugar by Crystal at its factory located in California north of the 36th parallel during the years ending

- (a) August 1, 1938;
- (b) August 1, 1939;
- (c) August 1, 1940;
- (d) August 1, 1941;
- (e) August 1, 1942;
- (f) August 1, 1943.

Answer to Interrogatory No. 8-B

- (a) 179,592 tons of 2,000 pounds each.
- (b) 196,489 tons of 2,000 pounds each.
- (c) 262,551 tons of 2,000 pounds each.
- (d) 270,010 tons of 2,000 pounds each.
- (e) 218,795 tons of 2,000 pounds each.
- (f) 199,157 tons of 2,000 pounds each. [6]

Interrogatory No. 8-D

Set forth the tonnage of sugar beets grown in California north of the 36th parallel during each of the years hereinafter set forth and manufactured during said years into sugar beets by Crystal during the years ending

- (a) August 1, 1938;
- (b) August 1, 1939;
- (c) August 1, 1940;
- (d) August 1, 1941;
- (e) August 1, 1942;
- (f) August 1, 1943.

Answer to Interrogatory No. 8-D

The request made in this Interrogatory contains a contradiction since the sugar beets grown in the designated periods are not necessarily manufactured in the same period. It is believed, however, that the information desired by plaintiffs is to be found in the figures set forth below. The tonnages given are of beets grown during the crop years 1937 to 1942, both inclusive, in areas in California north of the

36th parallel and delivered to and processed into sugar by Crystal.

- (a) 208,013 tons of 2,000 pounds each.
- (b) 208,350 tons of 2,000 pounds each.
- (c) 301,904 tons of 2,000 pounds each.
- (d) 309,183 tons of 2,000 pounds each. [7]
- (e) 256,484 tons of 2,000 pounds each.
- (f) 213,803 tons of 2,000 pounds each.

Interrogatory No. 9-B

Set forth the tonnage of sugar manufactured by Crystal at sugar beet factories located in California north of the 36th parallel during the years ending

- (a) August 1, 1938;
- (b) August 1, 1939;
- (c) August 1, 1940;
- (d) August 1, 1941;
- (e) August 1, 1942;
- (f) August 1, 1943.

Answer to Interrogatory No. 9-B

- (a) 27,253.00 tons of 2,000 pounds each.
- (b) 29,021.55 tons of 2,000 pounds each.
- (c) 42,435.30 tons of 2,000 pounds each.
- (d) 41,340.40 tons of 2,000 pounds each.
- (e) 32,698.60 tons of 2,000 pounds each.
- (f) 29,532.35 tons of 2,000 pounds each.

Interrogatory No. 9-C

Set forth the tonnage of sugar manufactured by Crystal from sugar beets produced in California

north of the 36th parallel during each of the years ending

- (a) August 1, 1938;
- (b) August 1, 1939; [8]
- (c) August 1, 1940;
- (d) August 1, 1941;
- (e) August 1, 1942;
- (f) August 1, 1943.

Answer to Interrogatory No. 9-C

The information requested in this Interrogatory cannot be furnished since some of the sugar beets produced in California north of the 36th parallel and delivered to Crystal were not processed into sugar at Crystal's Clarksburg, California, factory. As to such beets processed elsewhere, their identity as beets produced in California north of the 36th parallel was lost, and, consequently, the tonnage of sugar manufactured from such transferred beets is not determinable.

Interrogatory No. 9-D

Set forth the tonnage of sugar manufactured by Crystal from sugar beets produced in California north of the 36th parallel but manufactured outside of said area, during the years ending

- (a) August 1, 1938;
- (b) August 1, 1939;
- (c) August 1, 1940;
- (d) August 1, 1941;
- (e) August 1, 1942;
- (f) August 1, 1943. [9]

Answer to Interrogatory No. 9-D

The information requested in this interrogatory cannot be furnished, since beets produced in California north of the 36th parallel but manufactured outside of such area lost their identity as beets produced in California north of the 36th parallel; consequently, the tonnage of sugar manufactured from such beets is not known.

Interrogatory No. 11

Set forth all interoffice memoranda, communications, letters, directives, orders and instructions made, given or issued by Crystal between January 1, 1937 and January 1, 1943 regarding the form or contents of the contract between American Crystal Sugar Company and growers or regarding any change in the form of or wording of any contract or contracts between the company and the growers.

Answer to Interrogatory No. 11

The answer includes the following documents:

American Crystal Sugar Company

Intra-Company Correspondence

Attention of Mr. H. E. Zitkowski, Vice Pres.,
Clarksburg, California.

Denver Office

September 12, 1938

George was in this morning after his trip to Chicago and we discussed for a few minutes the changes mentioned in the 1939 beet contracts. The *limination* of Paragraph (3) and the changes you mention in Paragraph (10) meets with his [10] approval.

In regard to the joint net return, while he hesitated to be critical of it, he was afraid that due to the larger volume of net sugar that the Spreckels Sugar Company sold they would attempt to push their cane sales, in which they alone were interested, and ship beet sugar where there was a freight absorption as the growers stood 50% of this. Naturally the question arises on joint net as to whether the net of each Company will bear the same weight as another Company or whether it will be adjusted to volume of each individual Company. The thing I am trying to arrive at is whether the final net will be adjusted to volume per Company or whether we would just add the three nets for Companies and divide by three to obtain the net sales price.

If it will lead to a single sales agency controlled by the three companies with the absolute understanding that they are to take any and all business in competition with cane even if it cuts into the Sea Island business, we could probably sell the idea very readily. I can certainly see advantages in this particular deal and I am rather inclined to believe it to be a good idea.

I am enclosing a suggested addition to the schedule in paragraph (6) which we worked up for our own information. If it were to be incorporated in the contract I would change "percentage sugar extraction" to read "basis for sugar [11] extraction."

Very truly yours,

Lester J. Holmes, Manager

L.J.H.—LJH:AH

Enclosure

Air Mail

Denver, Colorado

Mr. L. J. Holmes, Manager

Sept. 19, 1938

Clarksburg, California

The 1939 beet purchase contract for the Clarksburg factory is in the printer's hands and will probably be available for shipment to you today. This will reach you in a few days.

In the meantime, in order that you may follow more clearly the changes made in the contract from that of a year ago, I am sending you a copy of the form prepared for the printer. Do not let this scare you, as a great many of these changes are for the printer's instruction in order to make the general make-up of the contract as nearly identical as is possible with that of our other forms used elsewhere. Until now the general form of the contract was the old Amalgamated form, which we are now correcting to conform with the make-up used in our other contracts. The old Clause 3 in your 1938 contract referring to irrigation limitations is out. In the old Clause 5, new Clause 4, the reference to beets of less than 12 per cent sugar or less than 80 per cent purity has been eliminated. The new Clause 5 it was necessary to change in order to define the net returns for sugar which in the future are to be based on the nets received by all of the beet sugar companies of northern California. The new Clause 6, your former Clause 7, defining net returns has been [13] altered in order to cover all the sugar companies involved, and at the same time make as nearly as is possible the same phraseology as is used in all our other con-

tracts. Clause 9, the former 10, has been altered in order to eliminate the objection raised by Mr. George Wilson that the Company, under the old phraseology, apparently had sole option at its discretion to change the quantity of beets as seemed necessary by the Company. I think this should remove all possible objection that there might have been to the old phraseology as it confines the Company's authority in the matter of a reduction to the extent necessary or required by lawful authority.

We have been advised that a meeting will be held in Chicago next Monday, the 28th, on the subject of proportionate shares and at that time we shall undoubtedly learn definitely concerning the acreage that will be allocated to the various beet growing districts of this country. Inasmuch as more than 30,000 acres in total are to be allowed the industry as a whole, which is more than has ever been planted heretofore, there should be no serious difficulty in obtaining a reasonably full acreage for all territories, although there probably will be some difference of opinion amongst the respective districts as to just what share of this total the various territories are entitled to.

The other sugar companies in northern California seem [14] to be most anxious to get their contracts in the field in that territory, and as we do not want to lag behind we have also taken prompt action to get the contract printed and to you. I see no reason why you should not begin to write acreage immediately, having in mind, of course, that that acreage

ment for that district. We shall probably know more about the entire program after the hearing in Chicago next Monday, and will, of course, promptly advise you of any limitations that we may be forced to accept for the Clarksburg district. In the meantime, in writing acreage, however, it should be understood that there is a possibility of a readjustment and we should confine ourselves to our district and our growers. In other words, we should proceed on the assumption that we will not take other companies' growers.

You have had some question as to the joint net, which we want, in all sincerity, to give a thorough trial. Theoretically at least this should work out to the advantage of the industry as a whole. This joint net will be the weighted average of the total sugar sold by each of the interested companies. In other words, it will be adjusted to volume. In all sincerity I do not believe your fears concerning the possibility that some sugar company may sacrifice its beet sugar are justified. Beet sugar as you know is selling [15] below cane, and the larger consumers especially are more interested in price than whether sugar is beet or cane. In any event, we all feel that this is deserving of a thorough trial.

You made a further suggestion in connection with the scale regarding showing percentage extraction and so on on the scale. We have not accepted this suggestion of yours for several reasons—one of them that we do have different extraction bases in almost each one of our purchase contracts. If we show it

in one we should show it in all, and if we show it in all we shall have endless explanations to make as to why the variations in these percentage scales. I do not want to introduce any new factor as it would complicate our problem as a whole rather than simplify it.

Now further as to contracting. The first thought you will have is how much acreage can we write for Clarksburg. We hope to be able to answer that question more definitely early next week. There is the possibility, however, that we will not be allowed as much acreage as we contracted for the 1938 crop. If such is the case, or in any event, we should be very careful to avoid as far as possible the need for heavy financing to grow the crop of beets on the part of our Company. This matter of financing the growers has been growing on us substantially and this year will run into considerable proportions. I realize you are selecting your [16] growers and risks, but nevertheless there is considerable risk involved and we have been criticized as financing some growers at least for a greater amount per acre than any other sugar company, which criticism may be true. I feel we should consider this very carefully and reduce to a minimum such acreage needing extensive financing by the Company, whether that be done directly or through a guarantee at the banks.

Yours very truly,

H. E. Zitkowski, Vice-President.

HEZ:m

Copy sent to Mason City 9-30-38

American Crystal Sugar Company

Intra-Company Correspondence

Attention of Mr. H. E. Zitkowski, Vice-President

Clarksburg, California

Sept. 28, 1938

Denver Office

We have discussed the contract for 1939 with several representatives of the Association and growers in this territory and we expect to contact more as soon as possible. We have talked with Gus Olson, Guy Fraser, George Wilson, and George Holmes regarding this matter and all have agreed that the most essential thing is to obtain more money for [17] sugar beets and if this is a step in that direction, they are willing to go ahead with it on trial.

While we have not mentioned the contract specifically with other growers, we have attempted to obtain some statements as to their opinion of the sugar business and as to whether or not they are of the opinion that the Company is making all the money. Very few realize the great difference caused by settlement being made below three and a quarter and practically all feel that the Government program has been a failure as far as providing more money for the growers, although it may have had the effect of cutting into the factory profit. At any rate the main theme seems to be "get more money"; if this points in that direction, they are willing to go ahead with it.

Very truly yours,

Lester J. Holmes, Manager

L.J.H.—LJH:AH

entered into. I would also recommend that we include a \$3.00 net in the breakdown of prices. [19]

In paragraph (7), the last part of it should be deleted and covered by paragraph (14), with provision made for the signature of the landowner as well as the tenant.

I have not discussed with the Committee of the Beet Growers Association your comments relative to net below \$3.25. Personally I feel that it is only reasonable, and if you wish me to get their views on this matter, I will do so. Naturally, their first reaction will be that it is out of line and I believe I should be pretty well informed before attempting to bring this subject up.

Very truly yours,

Lester J. Holmes, Manager

L.J.H.

LJH:AH—Encl.

Copy to Missoula 11/1/39

American Crystal Sugar Company
Clarksburg Factory

L. J. Holmes, Manager	Clarksburg, Calif.
F. C. Zitkowski, Superintendent	Oct. 31, 1939
G. W. Huhn, Cashier [20]	

Attention: Mr. H. E. Zitkowski, Vice-President
Denver Office

Last night Frank and I met with a growers committee representing the local organization of the

Central California Beet Growers Ass'n. to consider the 1940 contract. They have three objections to the contract as presented.

The first objection was that the agreement providing for net selling price based upon the average of the three companies is entirely wrong in principle and this should be stricken out. They feel that they are growing beets for the American Crystal Sugar Co. and should not be at all interested in the net received by other companies. I argued that this agreement was entered into last year and should at least be continued until we have at least had a chance to prove or disprove the advantages even though it continues into a two-year proposition. As far as I can ascertain this feeling is general but at the same time it is hardly right to condemn a practice before we have been able to see the results. I believe we can prevail upon them eventually to accept this part for 1940. However, they were rather outspoken in their condemnation of the policy with other companies.

The second complaint was in regard to the scale for the purchase price of beets. The present 1939 scale was established with a $53\frac{1}{2}$ cent processing tax and they feel [21] that if Congress should take off the processing tax that a new contract should be entered into by the sugar companies and the growers so that the relative value of a ton of beets will be the same to the processor and the grower. In other words, I take it to mean that a paragraph would be inserted in the contract definitely stipulating that this contract was signed with the understand-

ing that if any changes were made in the present sugar legislation that a new contract would be agreed upon by the growers' representative and the processor, whether the processing tax was raised or taken off entirely. The basis for this agreement is that in 1936 the processing tax and benefit payment were discontinued and the complaint is that the processors made a profit far beyond reason according to the arguments put up.

The third was the proposed reduction below three and a quarter to one percent for every three and one third cents decline which they feel should remain at one to five. I tried to point out to them that this was put in with the contemplation that the processing tax might be further increased and that the company could not operate on the margin provided while the grower would receive the remuneration in increased benefit payment. This, however, failed to make any impression as they all seemed to have the idea the Company is making a great profit and could well afford to leave the contract below three and a quarter as in 1939. Apparently these items [22] discussed were the main contract as far as everybody was concerned and I feel we made little progress with the men and stated I would refer their comments to you for action.

As far as the criticism of the rasp was concerned they were not at all interested feeling that they had been receiving a square deal. I further proved to them that with the test we were making that our method was correct.

The committee consisted of George Holmes, Herb-

ert Merwin, George Wilson, Gus Olson, Reuben Merwin, Bob Yelland, Ralph Krull, and A. J. Sweeney.

Very truly yours,

L. J. Holmes, Manager

L.J.H.

LJH:ER

cc - Mr. W. N. Wilds, President

Air Mail

November 6, 1939

Mr. Lester J. Holmes, Manager
American Crystal Sugar Company
Clarksburg, California

Personal

On returning to Denver, I find your letter of October 31st with reference to your meeting with the local growers committee on the subject of the 1940 beet purchase contract. I shall in all probability be with you in the near future, [23] and it may be well to permit the matter to rest until that time and then, if it is considered advisable, to discuss the subject further with the growers' representatives. It is difficult to cover such a discussion in a letter without going into it very extensively. Referring briefly, however, to the three points raised, let me give you the following comments.

Concerning the first objection, which refers to an average net selling price for the sugar produced in Northern California, I think you yourself understand the principles behind this very thoroughly. The principal objective therein is to attain, as far

as this is possible, a higher average net receipt for sugar by avoiding, as much as possible, cut-throat competition, crosshaul of sugar, and other similar practices, all of which tend to depress the receipts for sugar and benefit principally the transportation companies and some of the dealers in sugar to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets.

Concerning the second objection, the points are not well taken. The Clarksburg factory was built for the crop of 1935. At that time a beet purchase contract was established, which presumably was satisfactory for the 1936 crop, and this company operated that plant first in 1936, and the scale was increased. Following the 1936 crop and prior to [24] the enactment of the Sugar Act of 1937, the scale was further increased by an additional participation on the part of the grower of beets by dividing the returns from sugar on a basis of 60% to the grower and 40% to the factory if sugar netted above \$3.50 and on up to \$3.75, with a further split on a basis of 70% to the grower and 30% to the processor if sugar netted above \$3.75 and on up to \$4.50. This additional participation was introduced at a time when there was no tax on sugar and was to take care of additional payments to growers in the event of the absence of a tax and higher nets, and I think amply does so, having in mind the possibility of increased costs of processing beets due to inflation or war or such other factors as labor pressure. Already many items—especially steel, hardware, pipe and

fittings, brass and copper goods—have increased substantially. Sugar bags cost several cents more I believe than six months ago. There are likely to be further increases in the cost of materials, and probably also in factory labor.

Concerning the third objection, covering the proposed deduction should sugar fall below \$3.25 net, this was based on the information that the Administration and others were advocating an increase in the tax and an increase in the benefit payments to growers. If this tax is not increased it is not at all likely that sugar will drop below \$3.25, in which event there will be no application of this formula, and [25] the grower will not be hurt. But also I feel the factories need some protection in the event of extreme, radical legislation covering our industry. You state that the growers feel the Company is making great profit. You know from the annual report last issued that the income for the fiscal year ending with April 1st last was \$454,000.00, of which \$128,000.00 was income from Company farm and livestock feeding operations, leaving a very nominal return from sugar operations, especially having in mind the largest operations in the history of the Company were for the 1938 campaign. For that year our income from our farm operations was much greater proportionately than it was from sugar operations.

I am passing these brief statements on to you for your own information, as you undoubtedly will find it necessary from time to time to discuss this subject with various individuals.

I understand that both Spreckels and Holly have their beet purchase contracts in the field now. If you have learned anything of their reception in their territories, I should appreciate it if you will let me know.

With kindest personal regards.

Yours very truly,

H. E. Zitkowski, Vice President

HEZ:IM

[26]

American Crystal Sugar Company

Intra-Company Correspondence

Air Mail

Clarksburg, Calif.

Attention of Mr. H. E. Zitkowski

Sept. 27, 1940

Vice President

Denver Office

I am enclosing a clipping from the "Woodland Democrat" concerning the meeting of the beet growers held in Woodland last Wednesday night.

I did not attend the meeting at Clarksburg last night as after quite a little consideration, we decided that probably the growers would express themselves more freely if no representative from the Company were there. I did, however, happen to be at the Community Hall for another meeting earlier and talked a few minutes with Gordon Lyons concerning his program. I told him I thought his figures were misleading as he did not have a true picture regarding costs and also that profits were certainly far below what he would make them out to be.

This morning, George Holmes came in and gave me a fair outline of what the meeting amounted to and what they were attempting to do.

I think most of the growers here feel they have been treated fairly although naturally they want more money per ton of beets. I think they also realize that the profits [27] of the Company are certainly not exorbitant.

I believe there are two things to which the growers chiefly object. The first is the net sales price based on the average of the three companies; and the other is the deduction of $1\frac{1}{2}\%$ for each 5c below \$3.25. They feel that the 50-50 contract should be carried in the lower bracket. As far as I can find out, there was no demand for 50% of the pulp and molasses, although at Woodland, I noticed in the paper that they demand 50% of the sugar on a 92% extraction and also 50% of the pulp and molasses.

The Committee figures on holding meetings in all sections as you will notice, and the Executive Committee would like to meet at Stockton and form a plan, then later meet with the representatives of the Company about the fifteenth of the month in order to discuss the new program.

As far as the allotment for 1941 is concerned, it is my understanding that George Wilson is not entirely satisfied with the program until further discussion is had clarifying some of the points. George Holmes also states that today he has not made up his mind as it seems rather unwieldy.

We are still experiencing considerable difficulty in the Islands in getting beets and also some dif-

ficulty at the Mormon Dock in handling cars. However, I believe we now have this taken care of as we have purchased a lot of second-hand [28] cable and intend to run a sort of block and tackle in order that we can move the cars slower and with less effort. It has also been necessary to change crane operators, due to stalling.

We will have a detailed report for you shortly on Mandeville.

Very truly yours,

Lester J. Holmes, Manager

L.J.H.

LJH:AC

Interrogatory No. 26

Set forth a copy of said statement. (1938 crop year for Clarksburg.)

Answer to Interrogatory No. 26

Haskins & Sells

August 21, 1939

Certified Public Accountants

Denver National Building

Denver

American Crystal Sugar Company,

Denver, Colorado

Dear Sir:

We have made an examination of your records for the year ended July 31, 1939, for the purpose of ascertaining the average net return per one hundred pounds of sugar received from sugar manufactured at your Clarksburg, [29] California factory.

Such net return averages \$3.2973 per one hundred pounds as shown in the following tabulation:

Gross sales, less allowances.....	\$4.4545		
Less:			
Freight on sugar to destination.....	\$.1912		
Cash discount .....	.0881		
Federal excise tax on the manufacture			
of sugar, applicable to the sugar sold	.5347	.8140	\$3.6405
		<hr/>	
Less selling expenses:			
Insurance	\$.0159		
State taxes, and personal property taxes on sugar	.0423		
Storage (exclusive of storage in Company-			
owned warehouses) .....	.1085		
Shipping and handling charges (including cost			
of special packing) .....	.0676		
Brokerage and commission.....	.0466		
Miscellaneous (including sales department sal-			
aries and expenses, losses on accounts, etc.)..	.0623	.3432	
		<hr/>	
Net return			\$ 3.2973

Yours truly,

(Signed) Haskins & Sells.

[30]

Interrogatory No. 32

How and in what manner and when was the certified public accountant referred to under par. 6 of the agreement between Crystal and its growers chosen by the "companies" for (a) the cropping year 1939, (b) the cropping year 1940 and (c) the cropping year 1941?

Answer to Interrogatory No. 32

The three companies involved agreed to the appointment of the certified public accountant referred to in this Interrogatory. Such agreement resulted

from written communications between representatives of the said companies, and while there may have been conferences, too, if so, no details relating thereto are recalled. Crystal is not certain as to the dates on which the said accountant for the designated years was chosen, but the choice was made for the respective years on or before July 20, 1940, July 23, 1941, August 5, 1942.

It is assumed that Interrogatories 33 to 40, both inclusive, refer to and are connected with Interrogatory 32, and answers to 33 to 40 have been accordingly made. (Reporter's note: The interrogatory numbers referred to in the last above paragraph are the original Nos. 33 to 40.) [31]

Interrogatory No. 33

Who, on behalf of Crystal, took part in choosing said certified public account?

Answer to Interrogatory No. 33

W. N. Wilds and W. E. Kraybill.

Interrogatory No. 38

If this notification was in writing, set forth the copy of the writing. If oral, set forth the time, place and parties present and give the conversation.

Answer to Interrogatory No. 38

Assuming, again, that this Interrogatory refers to notification to the certified public accountant referred to in Interrogatory 32 (original number), the notification was not in writing. As stated in the

Answer to Interrogatory 37 (original number), R. H. Graham, on behalf of Crystal, gave notice to the accountant on the dates set forth in the Answer to Interrogatory No. 32 (original number). The substance of the conversation in connection with the notification of employment for the crop year 1939 was that the accountant was to determine the average net returns received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, in accordance with the provisions of Crystal's contract for that year. The accountant had the individual net returns from sugar sold from Crystal's Clarksburg, California factory, and also the [32] individual net returns for sugar sold from the factories of Holly Sugar Corporation located in California north of the 36th parallel. The accountant was instructed to combine these figures with the individual net returns for sugar sold from the factories of Spreckels Sugar Company located in California north of the 36th parallel, and which figures were to be furnished by the firm of Lybrand, Ross Brothers & Montgomery, of San Francisco, California. It was understood that in accordance with the code of ethics governing accounting firms, no information obtained from any one of the three companies was to be disclosed to anyone else. Charges made by the said accountant in combining the figures were to be paid one-half by Crystal and one-half by Holly Sugar Corporation. In view of the many years during which the designated accountant had calculated and certified net returns received for sugar sold from factories of Crystal and other sugar

companies, no detailed instructions were necessary to guide the accountant in arriving at the average net return of the three companies, as provided in Crystal's contract for the year 1939. After the engagement of the accountant for the cropping year 1939, the subsequent engagements for the crop year 1940 and 1941 were merely routine—directing the accountant to perform the same duties which had been performed in determining the net returns for the crop year 1939. [33]

Interrogatory No. 40

Set forth copies of all correspondence between the accountant and Crystal regarding his appointment, his notification and his functioning under the appointment and regarding his report or reports.

Answer to Interrogatory No. 40

Included in the answer were the following documents:

Haskins & Sells August 19, 1940

Certified Public Accountants

Denver National Building

Denver

American Crystal Sugar Company,

Denver, Colorado

Holly Sugar Corporation,

Colorado Springs, Colorado

Dear Sirs:

We have made an examination of your records for the year ended July 31, 1940 for the purpose of

ascertaining the average net return (per one hundred pounds of sugar) received from sugar sold and delivered during the year which was produced at your northern California factories.

We have received a certificate from Messrs. Lybrand, Ross Bros. & Montgomery following an examination made by them for the year ended July 31, 1940 in respect of [34] Spreckels Sugar Company.

The average net return per one hundred pound bag of sugar sold and delivered during the year, which was produced at the northern California factories of American Crystal Sugar Company, Holly Sugar Corporation, and Spreckels Sugar Company, amounted to \$3.131 as shown in the following tabulation:

Gross receipts from sales, less cash discounts and allowances				\$ 4.388
Less:				
Federal excise tax.....	\$.535			
Freight on sugar to destination.....	.479	1.014	\$3.374	
		<hr/>	<hr/>	
Less sales and marketing expenses:				
Insurance on sugar only.....	\$.009			
State taxes, and personal property taxes on sugar .....	.021			
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses) .....	.060			
Loading, handling, reconditioning, and additional cost of packing in small packages.....	.053			
Brokerage and commissions .....	.051			
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc. ....	.049	.243		
		<hr/>	<hr/>	
Net return from sales.....				\$3.131

Your truly,

(Signed) Haskins & Sells

Haskins & Sells

August 22, 1941

Certified Public Accountants
Denver National Building
Denver

American Cr̄ystal Sugar Company,
Denver, Colorado

Attention: Mr. W. N. Wilds

Dear Sirs:

We enclosed four copies of our letter report dated August 22, 1941 covering the average net return (per one hundred pounds of sugar) received from sugar sold and delivered during the year ended July 31, 1941, which was produced at the Northern California factories of American Crystal Sugar Company, Holly Sugar Corporation, and Spreckels Sugar Company.

Yours very truly,

(Signed) Haskins & Sells

Enclosures

[36]

Haskins & Sells

Certified Public Accountants

Denver National Building, Denver

American Crystal Sugar Company,

Denver, Colorado

Holly Sugar Corporation,

Colorado Springs, Colorado

Dear Sirs:

We have made an examination of your records for the year ended July 31, 1941 for the purpose of ascertaining the average net return (per one hundred pounds of sugar) received from sugar sold and delivered during the year which was produced at your northern California factories.

We have received a certificate from Messrs. Lybrand, Ross Bros. & Montgomery following an examination made by them for the year ended July 31, 1941, in respect of Spreckels Sugar Company.

The average net return per one hundred pounds of sugar sold and delivered during the year, which was produced at the northern California factories of American Crystal Sugar Company, Holly Sugar Corporation, and Spreckels Sugar Company, amounted to \$3.160 as shown in the following tabulation: [37]

Gross sales, less cash discounts and allowances.....	\$4.455		
Less:			
Federal excise tax.....	\$535		
Freight on sugar to destination.....	.468	1.003	\$3.452
		<hr/>	
Less sales and marketing expenses:			
Insurance on sugar only.....	\$.007		
States taxes, and personal property taxes on sugar	.031		
Storage on sugar (no charge is made for storage			
of sugar while in operative factory warehouses)	.071		
Loading, handling, reconditioning, and additional			
cost of packing in small packages.....	.071		
Brokerage and commissions.....	.051		
Miscellaneous, including sales department sal-			
aries and traveling expenses, advertising, tele-			
phone and telegraph expense, losses on ac-			
counts, etc. ....	.061	.292	
		<hr/>	
Net return from sales.....			\$3.160

Yours truly,

(Signed) Haskins & Sells [38]

Haskins & Sells August 22, 1942
 Certified Public Accountants
 Denver National Building, Denver

American Crystal Sugar Company,
 Denver, Colorado

Attention: Mr. W. N. Wilds

Dear Sirs:

We enclose four copies of our letter report dated August 22, 1942 covering the average net return (per one hundred pounds of sugar) received from sugar sold and delivered during the year ended July 31, 1942, which was produced at the northern Cali-

fornia factories of American Crystal Sugar Company, Holly Sugar Corporation, and Spreckels Sugar Company.

Yours very truly,

(Signed) Haskins & Sells

Encs.

Haskins & Sells

August 22, 1942

Certified Public Accountants

Denver National Building, Denver

American Crystal Sugar Company,

[39]

Denver, Colorado

Holly Sugar Corporation,

Colorado Springs, Colorado

Dear Sirs:

We have made an examination of your records for the year ended July 31, 1942 for the purpose of ascertaining the average net return (per one hundred pounds of sugar) from sugar sold and delivered during the year which was produced at your northern California factories.

We have received a certificate from Messrs. Lybrand, Ross Bros. & Montgomery following an examination made by them for the year ended July 31, 1942, in respect of Spreckels Sugar Company.

The average net return per one hundred pounds of sugar sold and delivered during the year, which was produced at the northern California factories of American Crystal Sugar Company, Holly Sugar Corporation, and Spreckels Sugar Company,

amounted to \$3.950 as shown in the following tabulation:

Gross sales, less cash discounts and allowances.....	\$5.132		
Less:			
Federal excise tax	\$5.535		
Freight on sugar to destination.....	.352	.887	\$4.245
		<hr/>	<hr/>
Less sales and marketing expenses:			
Insurance on sugar only.....	\$.007		
State taxes, and personal property taxes on sugar	.040		
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses)	.056		
Loading, handling, reconditioning, and additional cost of packing in small packages.....	.077		
Brokerage and commissions.....	.042		
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone expense, losses on accounts, etc.....	.073	\$.295	
		<hr/>	<hr/>
Net return from sales.....			\$3.950

Yours truly,

(Signed) Haskins & Sells

Interrogatory No. 50

Set forth month by month the amount of sugar beets received by Crystal from each of plaintiffs in this action for the 1939, 1940 and 1941 cropping seasons. [41]

Answer to Interrogatory No. 50

From Mandeville Island Farms

	1939	1940
August	2,089 tons	4,430 tons
September	5,629 tons	2,308 tons
October	7,978 tons	10,912 tons

November	6,660 tons	5,846 tons
December	1,934 tons

Total	22,356 tons	25,430 tons
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From Roscoe C. Zuckerman

1941

September	1,558 tons
October	8,172 tons
November	3,250 tons
December	1,166 tons

Total	14,146 tons
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Interrogatory No. 51

Set forth month by month the place at which beets received by Crystal from plaintiffs for each of the cropping seasons 1939, 1940 and 1941 were processed and the amount processed at each place so shown. [42]

Answer to Interrogatory No. 51

	Processed at Oxnard			Processed at Clarksburg		
	1939	1940	1941	1939	1940	1941
August				X	X	
September	X	X	X	X		
October	X	X	X	X	X	
November	X		X	X	X	X
December					X	X

It is not possible to determine the amount of beets processed at each place as requested in Interrogatory 51 (original number), as the beets have lost their identity, and no weights are obtained sub-

sequent to the first weights obtained at the time the beets are delivered to the receiving station. The weight of beets processed is at all times less than the weight purchased.

Interrogatory No. 52

Were any of the beets produced by either of plaintiffs during the cropping years 1939, 1940 or 1941 shipped to or processed into sugar at a factory located outside of that portion of California lying north of the 36th parallel, and if so state

(a) The date of each such shipments left San Joaquin or Sacramento counties: [43]

Answer to Interrogatory No. 52 and (a)
(respectively)

Yes.

(a) It is not possible to answer this sub-head of the Interrogatory since on the date the shipments left San Joaquin or Sacramento counties the beets had lost their identity as plaintiffs' beets.

Interrogatory No. 52 (b)

(b) The date each shipment arrived at the refinery where they were processed;

Answer to Interrogatory No. 52 (b)

(b) Because of loss of identity as explained in (a) above, this sub-head of the Interrogatory cannot be answered.

Interrogatory No. 52 (c)

(c) The weight at point of commencement of shipment of the beets involved in each shipment;

Answer to Interrogatory No. 52 (c)

(c) See answer to (a) above.

Interrogatory No. 52 (d)

(d) The weight at point of destination of the beets involved in each shipment;

Answer to Interrogatory No. 52 (d)

(d) See answer to (b) above.

Interrogatory No. 52 (e)

(e) The place where the sugar content and weight of the [44] beets were determined in so far as payment to plaintiffs was concerned.

Answer to Interrogatory No. 52 (e)

(e) The sugar content was determined at Clarksburg, California.

The gross weight was determined at the scales of the beet dump where beets were originally received.

Interrogatory No. 54

If the answer to either item 52 (original number) or 53 (original number) was in the affirmative, state whether the net returns from the sale of sugar produced from said beets processed outside of that portion of California which is located north of the 36th parallel was included in determining the "average net returns" for growers in California north of the 36th parallel under pars. 5 and 6 of the 1939, 1940 or 1941 contracts.

Answer to Interrogatory No. 54

No.

Interrogatory No. 55

If the answer to either Interrogatories 52 or 53 was in the affirmative, state whether the net return from the sale of sugar produced from such beets was included in determining the payment to growers who produced beets in California south of the 36th parallel and who delivered them to Crystal. (Nos. 52 and 53 above are original numbers.) [45]

Answer to Interrogatory No. 55

Yes.

Interrogatory No. 58

Was this amount arrived at by averaging the net return of American Crystal with the net return of any one or more refineries and if so what refineries?

Answer to Interrogatory No. 58

Although it is not free from doubt whether Interrogatory 58 (original number) and each succeeding Interrogatory through No. 70 (original number) refer to the 1939 grower contract and settlement thereunder, it has been assumed that such is the case, and the Answers to said Interrogatories have been made on that assumption.

The figure given in the Answer to Interrogatory 57 (original number) was arrived at by averaging the net return received by Crystal for sugar sold from its Clarksburg, California factory, with the net return received by Holly Sugar Corporation for sugar sold from its factories at Alvarado, California, Tracy, California, and Hamilton City, California,

and the net return received by Spreckels Sugar Company for sugar sold from its factories located at Spreckels, California, Manteca, California, and Woodland, California.

Interrogatory No. 61

Who determined the average net return of Crystal that [46] was used in determining the average of the companies and how was it determined?

Answer to Interrogatory No. 61

In obtaining the return for the contract year ended July 31, 1940 (the 1939 crop year), the average net return for each of the three companies was not required and accordingly there was no weighting of averages. The average net return per one hundred pounds of sugar sold during the year which was produced at the factories of American Crystal Sugar Company, Holly Sugar Corporation, and Spreckels Sugar Company, (all located in California north of the 36th parallel), represented the result of dividing the total dollar amount of net return from sales (gross receipts from sales less cash discounts and allowances, Federal excise tax, freight, and sales and marketing expenses) by the total number of 100 pound bags sold. The determination was made by Haskins & Sells.

Interrogatory No. 62

Set forth the figures and the method of calculation and the calculation from which the average net return of Crystal was determined.

Answer to Interrogatory No. 62

Number of Bags of Sugar Sold (expressed in terms of 100 lbs. to a bag).....	816,009
Gross Receipts from Sales, Less Cash Discounts and Allowances	\$ 3,585,216.43
Less:	
Federal excise tax.....	\$ 436,146.05
Freight on sugar to destination.....	357,582.96
Total.....	\$ 793,729.01
Remainder.....	\$ 2,791,487.42
Less Sales and Marketing Expenses:	
Insurance on sugar only.....	\$ 11,647.70
State taxes, and personal property taxes on sugar....	37,847.67
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses).....	75,125.26
Loading, handling, reconditioning, and additional cost of packing in small packages.....	53,381.32
Brokerage and commissions.....	39,002.25
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc.....	25,885.10
Total sales and marketing expense.....	\$ 242,889.30
Net Return From Sales.....	\$ 2,548,598.12

Also see answer to Interrogatory 96 (original number). [48]

Interrogatory No. 86

Do you know of any instance or instances in which any of said three manufacturers of sugar beets other than Crystal bought sugar beets from any grower in California north of the 36th parallel who did not buy sugar beet seeds from that manufacturer and if so set forth, for each instance, the name of

the manufacturer and the name of the grower, and the approximate dates.

Answer to Interrogatory No. 86

No.

Interrogatory No. 87

The answer of Crystal admits the authenticity of the form and contents of those certain contracts, copies of which are annexed to the amended complaint as Exhibits A, B, C and D. Exhibit B is the 1939 Grower Contract. It provides in par. 5 that the price to be paid the grower should be determined upon the average net returns received for sugar manufactured at beet sugar factories located north of the 36th parallel and sold during the period therein set forth. Exhibit A is the 1938 contract. This provides that the price to be paid the grower should be determined upon the average net return received by Crystal from sugar manufactured at its Clarksburg factory and sold by it during a specified period. Was this change in the method of payment from the 1938 method of using average net return from sugar [49] manufactured at Crystal's Clarksburg factory to 1939 method of using the average net return of all beet sugar factories in California north of the 36th parallel, made with or without consultation, discussion or conference by Crystal with any of the other manufacturers of sugar in California north of the 36th parallel?

Answer to Interrogatory No. 87

The change referred to in this Interrogatory was made with consultation, discussion or conference

by Crystal with the other manufacturers of sugar in California north of the 36th parallel.

Interrogatory No. 90

When did Crystal acquire its Clarksburg factory; how did it acquire it; and what was the cost of the factory and the cost of its equipment?

Answer to Interrogatory No. 90

Crystal acquired its Clarksburg factory on April 16, 1936 from The Amalgamated Sugar Company through an exchange of assets. At the time of acquisition a value of \$1,116,162.44 was allocated for the Clarksburg factory site, buildings, and equipment. Our records do not disclose separately the cost of the factory and the cost of its equipment.

Interrogatory No. 91

What other beet sugar factories were acquired by Crystal [50] from January 1, 1937 to December 31, 1943 and what was the location and cost of each factory and what was the cost of the equipment of each?

Answer to Interrogatory No. 91

No other beet sugar factories were acquired by Crystal during the designated period.

Interrogatory No. 96

It is alleged in sub-paragraph (m) of paragraph V of the answer herein that the net sales return secured from sugar sold by defendant from its Clarksburg, California, factory was in 1939 \$3.123, 1940 \$3.163, in 1941 \$3.970. Set forth an itemized breakdown of said figures for each year, showing all items of income and all items of expenditure that entered into said figures. [51]

AMERICAN CRYSTAL SUGAR CO.—Itemized Breakdown of Net Sales Return Per Cwt. for Years Shown Below

	1939	1940	1941
Gross receipts from sales, less cash discounts and allowances.....	\$4.394	\$4.450	\$5.081
Less:			
Federal Excise Tax.....	\$.535	\$.535	\$.535
Freight on sugar to destination.....	.438	.387	.322
	<hr/>	<hr/>	<hr/>
Less Sales and Marketing Expenses:			
Insurance on sugar only.....	.014	.014	.007
State Taxes, and personal property taxes on sugar.....	.047	.078	.060
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses)	.092	.113	.052
Loading, handling, reconditioning and additional cost of packing in small packages.....	.066	.065	.061
Brokerage and Commissions.....	.048	.048	.038
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc. ....	.031	.047	.036
	<hr/>	<hr/>	<hr/>
Net return from sales.....	\$3.123	\$3.163	\$3.970

Interrogatory No. 107

Do you know of any instance in California north of the 36th parallel during the cropping years 1937, 1937, 1948, 1942 or 1943 in which any manufacturer of sugar from sugar beets paid the grower of sugar beets a price not determined by the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer or by a particular factory or factories of that manufacturer, and if so state the time and place of each of such instances, the name of the grower and the name of the manufacturer.

Answer to Interrogatory No. 107

Crystal is informed and believes that during the cropping years 1937, 1938, 1942 and 1943, sugar beets were grown north of the 36th parallel and processed by the Union Sugar Company factory at Betteravia, California, and that the said Company, the processor of such beets, paid the growers of the beets on a price that was not based on the net returns from the sale of sugar manufactured in California north of the 36th parallel. Names of such growers are not known.

Crystal paid in the cropping year 1942 for early delivered beets \$1.00 per ton the first week, 70 cents the second week and 35 cents the third week, these payments in addition to the scale price. Crystal also paid for 1942 [54] beets a bonus of 50 cents per ton above the scale price.

1943 crop beets were purchased under the Commodity Credit Corporation Support Program, and Crystal, as well as all other processors, paid to the

growers a price not based upon the net returns from the sale of 1943 crop sugar. The price Crystal paid was composed of a base payment, a support payment established by Commodity Credit Corporation, an early delivery incentive of 25 cents per ton and an incentive payment of \$1.00 per ton.

While other companies entered into contracts at least for the 1942 crop season with growers north of the 36th parallel which provided for payment of beets in addition to the price determined (in part) by the net returns as described in this Interrogatory, Crystal does not know whether such additional payments were made.

(While the Interrogatory includes the year 1938, it has been assumed, in this Answer, that 1938 was intended.)

Interrogatory No. 110

Do you know of any instance in which any manufacturer of sugar from sugar beets in California north of the 36th parallel purchased sugar beets during the cropping years 1939, 1940 and 1941 from a grower for manufacture into sugar, which manufacturer did not purchase the same under a contract which provided that the price to be paid to the grower should be determined upon the average net returns from the sale of [55] raw sugar of all sugar manufactured in manufacturing plants in California north of the 36th parallel. If so, state the name of the grower, the name of the manufacturer and the date.

Answer to Interrogatory No. 110

No.

Interrogatory No. 113

When did Crystal make final settlement under its agreement with sugar beet growers in California north of the 36th parallel

- (a) for the cropping year 1937;
- (b) for the cropping year 1938;
- (c) for the cropping year 1939;
- (d) for the cropping year 1940;
- (e) for the cropping year 1941;
- (f) for the cropping year 1942;
- (g) for the cropping year 1943.

Answer to Interrogatory No. 113

- (a) Between August 1 and August 31, 1938
- (b) Between August 1 and August 31, 1939
- (c) Between August 1 and August 31, 1940
- (d) Between August 1 and August 31, 1941
- (e) Between August 1 and August 31, 1942
- (f) Between August 1 and August 31, 1943
- (g) On or before the 15th day of the month following the delivery of beets to Crystal. [56]

Interrogatory No. 121

Did you have any knowledge or information sufficient to form a belief as to whether or not growers of sugar beets in California north of the 36th parallel could or could not have sold their beets at a profit to any manufacturer of sugar other than Crystal, Holly Sugar Corporation or Spreckels Sugar Company, during any of the cropping years 1937 to 1942, both inclusive, and if so, state that knowledge or information.

Answer to Interrogatory No. 121

No.

Interrogatory No. 122

Have you any knowledge or information sufficient to form a belief as to whether or not sugar beet seeds were available to growers of sugar beets in California north of the 36th parallel from any source other than Crystal, Holly Sugar Corporation or Spreckels Sugar Company during any of the cropping years 1937 to 1942, both inclusive, and if so, state what knowledge or information.

Answer to Interrogatory No. 122

No.

Interrogatory No. 123

Did Crystal sell or supply sugar beet seeds to any grower or producer of sugar beets in California north of the 36th parallel during the cropping years 1938 to 1941, both [57] inclusive, who did not contract with it under one of its grower contracts, Exhibits A, B, C and D, respectively, of the amended complaint?

Answer to Interrogatory No. 123

Crystal did sell or supply sugar beet seeds to growers of sugar beets in California north of the 36th parallel during the cropping years 1938 to 1941, both inclusive, who did not contract with it under one of its grower contracts, Exhibits A, B, C and D, respectively, to the amended Complaint, since seeds were furnished to the Company's growers north of the 36th parallel who had signed Crystal's Oxnard factory contracts. Crystal may have also sold

or supplied sugar beet seeds to other growers or producers of sugar beets in California north of the 36th parallel during the designated years who did not contract with it as stated in the Interrogatory, since there have been instances in which beet seeds have been sold and delivered to prospective growers who did not subsequently contract with Crystal for the growing of beets. No specific instances in which this occurred are known to Crystal.

Interrogatory No. 132

What were the annual upkeep and operating expenses of the factory of Crystal in California north of the 36th parallel during each of the years 1937 to 1943, both inclusive? [58]

Answer to Interrogatory No. 132

There are inadequate criteria in this Interrogatory to guide Crystal in answering. And there is considerable diversity of opinion among accountants as to what constitutes "annual upkeep and operating expenses." However, the following figures have been prepared, which Crystal feels fairly reflect "annual upkeep and operating expenses," as requested. The figures include Labor, Supplies, Maintenance and Repairs, Local General Expenses, Insurance, Taxes and Depreciation.

1937	\$600,717.91
1938	564,561.99
1939	675,918.87
1940	729,205.45
1941	673,831.73
1942	759,930.73
1943	542,359.71

Interrogatory No. 137

If your answer to the preceding interrogatory was in the negative, then set forth the method of pricing used by Crystal in the sale of sugar during each of the years 1937, to 1943, both inclusive?

Answer to Interrogatory No. 137

Sales of sugar made by Crystal during each of said years were made at prices determined by the price of cane [59] sugar at the Seaboard cane sugar refineries, such as San Francisco, New York, or New Orleans, adding such freight as there may have been from the refinery point producing the lowest price at the destination, subject always to the prevailing differential between the price of *cane* sugar and beet sugar, and further subject to such adjustments as were necessary to meet the competition of other sellers of sugar.

Interrogatory No. 138

During the years 1937 to 1943, both inclusive, when Crystal sold sugar for delivery to a given point in the United States, was the price in any way affected by the location of the particular factory at which the sugar was manufactured and if so state how or in what manner?

Answer to Interrogatory No. 138

No.

Interrogatory No. 139

During each of said years, when sugar was shipped from the Clarksburg, California, factory to Crystal to a purchaser in

- (a) Stockton, California,
- (b) Sacramento, California,
- (c) Portland, Oregon,
- (d) Los Angeles, California,
- (e) Salt Lake City, Utah,
- (f) Denver, Colorado, [60]
- (g) Phoenix, Arizona,

was the price the San Francisco price, plus freight from San Francisco? If the answer is in the affirmative, state in which of said years that situation applied. If the answer is in the negative, set forth what the pricing method was.

Answer to Interrogatory No. 139

The price of sugar shipped, if any, from the Clarksburg, California, factory to the destinations named in this Interrogatory, in each of the years 1937-1943, both inclusive, was the San Francisco price of cane sugar (less the prevailing differential between the price of cane sugar and beet sugar) plus the freight from San Francisco, subject to adjustments necessary to meet the competition of other sellers of sugar.

Interrogatory No. 140

During each of said years, when sugar was shipped from the southern California factory of Crystal to a purchaser in

- (a) Stockton, California,
- (b) Sacramento, California,
- (c) Portland, Oregon,
- (d) Los Angeles, California,
- (e) Salt Lake City, Utah,

(f) Denver, Colorado,

(g) Phoenix, Arizona,

was the price the San Francisco price, plus freight from [61] San Francisco? If the answer is in the affirmative, state in which of said years that situation applied. If the answer is in the negative, set forth what the pricing method was.

Answer to Interrogatory No. 140

The price of sugar shipped, if any, from the Oxnard, California, factory to the destinations named in this Interrogatory, in each of the years 1937-1943, both inclusive, was the San Francisco price of cane sugar (less the prevailing differential between the price of cane sugar and beet sugar) plus the freight from San Francisco, subject to adjustments necessary to meet the competition of other sellers of sugar.

By way of a general preface to the answers to Interrogatories 145 to 167, both inclusive, (original numbers) Crystal states that during the periods involved in the "Additional Interrogatories," the Company had few growers north of the 36th parallel who contracted with the Company's Oxnard factory, as will more fully appear from the answers; that, generally speaking, all of such growers delivered their beets to the Company's dump at Tagus, California; that conceivably some beets delivered at Tagus may have been grown south of the 36th parallel; that it is also conceivable that some few beets grown north of the 36th parallel were delivered to Crystal at a beet dump south of the parallel;

[62] that the variation one way or the other, if any, would be inconsequential in relation to the total figures involved. An exact determination as to the source of each ton of beets grown in this border area, that is, whether grown north or south of the 36th parallel, would involve an attempt to reconstruct facts and records, which would almost certainly be impossible at this date, and an inspection and perhaps a survey of each farm near the parallel from which beets were delivered during the years covered by the Interrogatories. In view of these circumstances, Crystal has assumed, in preparing the answers to Interrogatories 145 to 167 (original numbers), both inclusive, that all beets grown north of the 36th parallel under contracts with Crystal's Oxnard factory, and only such beets, were delivered at the Tagus, California, beet dump.

Interrogatory No. 145-C

Plaintiff Mandeville delivered in the 1939 season 22,355.6 tons of sugar beets of 18.25% sugar content. What would have been paid to a grower who signed an Exhibit 14 type of contract who delivered to Crystal in that season sugar beets of that quantity and quality?

Answer to Interrogatory No. 145-C

\$125,154.36. [63]

Interrogatory No. 145-D

Plaintiff Mandeville delivered in 1940, 25,430.3 tons of sugar beets of 15.55% sugar content. What would have been paid to a grower who signed an

Exhibit 16 type of contract who delivered to Crystal in that season sugar beets of that quantity and quality?

Answer to Interrogatory No. 145-D

\$120,921.08.

Interrogatory No. 145-E

Plaintiff Zuckerman delivered in 1941, 14,144.7 tons of sugar beets of 15.47% sugar content. What would have been paid to a grower who signed an Exhibit 18 type of contract who delivered sugar beets to Crystal in that season of that quantity and quality?

Answer to Interrogatory No. 145-E

\$83,552.74.

Interrogatory No. 146

On page 2 of the Amendment to Answer in subparagraph "m" there appears the following: "Alleges that although it does know the tonnage, at the point of delivery, of the beets produced by plaintiffs, and each of them, and delivered to it, which were subsequently shipped to its refinery in Southern California located at Oxnard, it does not know the tonnage of plaintiffs' beets so shipped at the point of commencement of shipment to said refinery [64] at said Oxnard."

(A) Set forth year by year the tonnage at point of delivery for beets produced by each of the plaintiffs.

Answer to Interrogatory No. 146 (A)

The tonnage of beets delivered by each of the plain-

tiffs at point of delivery, which were subsequently shipped to Crystal's factory at Oxnard, California, during each of the years in question, was as follows:

	Tons	Delivered by
1939	14,348	Mandeville Island Farms, Inc.
1940	13,167	Mandeville Island Farms, Inc.
1941	10,381	Roscoe C. Zuckerman.

Interrogatory No. 146 (B)

As to such beets, were the accountings that were made to plaintiffs by Crystal based on the tonnage of beets at point of commencement of shipment or on the tonnage of beets at point of delivery at Oxnard or at some other point and if so what point?

Answer to Interrogatory No. 146 (B)

The accountings that were made to plaintiffs by Crystal were based on the weight of beets at the time they were delivered to Crystal's receiving stations. See answer to subdivision A of this Interrogatory.

Interrogatory No. 147

It is alleged in subparagraph "n" of said Amendment to [65] Answer, pages 2 and 3, that during the crop years 1939, 1940 and 1941, there were three manufacturers who operated sugar beet factories in Southern California, and that Exhibits 1 to 19 are copies of contracts in force during said periods in Southern California. Exhibits 14 to 19 both inclusive are Crystal contracts and they refer to "the four southernmost beet sugar companies in Southern California." Were there three beet sugar companies in Southern California as alleged in the

Amendment to Answer or four as set forth in said Exhibits, and if four, state their names.

Answer to Interrogatory No. 147

As alleged in paragraph 5 (n) of "Amendment to Answer," during the crop years 1939, 1940 and 1941 there were three manufacturers who operated sugar beet factories in "Southern California." As stated in the exhibits referred to, there were four beet sugar companies who operated in "Southern California"; however, one of the four contracted with growers for the production of sugar beets during the designated years, but did not operate a sugar factory in any of said years.

Interrogatory No. 148

It is alleged in subparagraph "p" of page 3 of the Amendment to Answer that the average joint net returns for sugar manufactured in Southern California during the cropping [66] years 1939, 1940 and 1941 was greater than the average net return for sugar manufactured during the same cropping years in Northern California.

(A) Set forth for each of said years the average net returns for sugar manufactured in Southern California.

Answer to Interrogatory No. 148 (A)

The average net returns, as defined in the contracts of the beet sugar processors who operated in "Southern California" during the designated years, received by the said "Southern California" processors for sugar manufactured at said processors'

“Southern California” factories and sold during the designated crop years are as follows:

1939	3.378c per pound
1940	3.398c per pound
1941	4.066c per pound

Interrogatory No. 148 (B)

(B) Set forth for each of said years the net return of Crystal for sugar manufactured in southern California.

Answer to Interrogatory No. 148 (B)

Crystal's net returns from the sale of sugar manufactured in its “Southern California” factory and sold during the designated crop years are as follows:

1939	3.155c per pound	
1940	3.227c per pound	
1941	4.068c per pound	[67]

Interrogatory No. 148 (C)

(C) Set forth for each of said years the net return of each of the other companies.

Answer to Interrogatory No. 148 (C)

Crystal does not know the net returns in each or any of the designated years of “each of the other companies”, or any of them.

Interrogatory No. 150

Exhibits 14 to 19 both inclusive provide that Crystal would pay freight on all beets in cars loaded to capacity.

(A) Did Crystal pay such freight during each of said years?

Answer to Interrogatory No. 150 (A)

(A) Yes.

Interrogatory No. 150 (B)

(B) Was such freight included in whole or in part in determining the average net returns under said contracts, and if in part, what part for each of said years?

Answer to Interrogatory No. 150 (B)

(B) No.

Interrogatory No. 150 (C)

(C) Did Crystal pay the freight on the beets produced by plaintiffs which were shipped to the Oxnard factory in 1939, 1940 and 1941? If so, was that freight or any part thereof charged as a part of Northern California operations or [68] Southern California operations or neither? And if so, what part as to each of said years?

Answer to Interrogatory No. 150 (C)

(C) Yes. All charged to "Southern California" operations.

Interrogatory No. 150 (D)

(D) Was such freight in whole or in part included as a cost, expense or charge in determining the average net returns under either the Northern or Southern California contracts for any of said years and if so under which contract for each of said years and in what amounts?

Answer to Interrogatory No. 150 (D)

(D) No.

Interrogatory No. 150 (E) (a)

No specific reference is made to freight in the Northern California contracts for 1939, 1940 and 1941. Who paid the freight or delivery charges on beets produced in Northern California

(a) and transported to Clarksburg during each of said years;

Answer to Interrogatory No. 150 (E) (a)

(E) (a) American Crystal Sugar Company.

Interrogatory No. 150 (E) (b)

(b) and transported to Oxnard during each of said years? [69]

Answer to Interrogatory No. 150 (E) (b)

(E) (b) American Crystal Sugar Company.

Interrogatory No. 151

Set forth by crop years 1939, 1940 and 1941 the total amount of freight and transportation charges upon beets produced during each of said years in Northern California and delivered to defendant and processed in Southern California.

Answer to Interrogatory No. 151

The information requested cannot be furnished due to the fact that some of the pertinent records have been destroyed.

Interrogatory No. 153

Set forth the tonnage of sugar beets produced in California north of the 36th parallel and manufactured into sugar by Crystal in Southern California during each of the crop years 1938, 1939, 1940, 1941 and 1942.

Answer to Interrogatory No. 153

The tonnage of sugar beets produced in California north of the 36th parallel which were shipped by Crystal to its Oxnard, California, factory for manufacture into sugar, for each of the designated years was as follows:

1938	11,745 tons	
1939	39,469 tons	
1940	39,023 tons	[70]
1941	37,089 tons	
1942	14,463 tons	

The figures given above are not to be construed as the tonnage of those beets which were manufactured into sugar by Crystal at its Oxnard, California, factory from beets produced in California north of the 36th parallel.

Interrogatory No. 154

Set forth the tonnage of sugar beets produced in Southern California and manufactured into sugar by Crystal in Southern California during each of the crop years 1938, 1939, 1940, 1941 and 1942.

Answer to Interrogatory No. 154

	Total tons
1938	174,529.9
1939	266,859.6
1940	254,712.5
1941	135,897.8
1942	276,105.1

The figures given above are not to be construed as the tonnage of those beets which were manufac-

tured into sugar by Crystal at its Oxnard, California, factory from beets produced in Southern California, but rather the tonnage of beets "produced" in "Southern California" for manufacture at the Oxnard factory. See answer to Interrogatory 156 (original number). [71]

Interrogatory No. 156

Set forth the total amount of sugar beets manufactured into sugar by Crystal in Southern California in each of the following crop years: 1938, 1939, 1940, 1941 and 1942.

Answer to Interrogatory No. 156

1938	180,794 tons
1939	295,901 tons
1940	284,585 tons
1941	166,714 tons
1942	274,372 tons

Interrogatory No. 160

In answer to Interrogatory 9 (original number), heretofore submitted, it is stated that "some of the sugar beets produced in California north of the 36th parallel and delivered to Crystal were not processed into sugar at Crystal's Clarksburg, California, factory. As to such sugar beets processed elsewhere, their identity as beets in California north of the 36th parallel was lost and consequently the tonnage of sugar manufactured from such transferred beets is not determinable." Is it true that it is impossible for any officer of Crystal to determine from any of its records the amount of sugar manufactured outside of Northern California by Crystal during the

crop years 1939, 1940 and 1941 from sugar beets produced in Northern California? [72]

Answer to Interrogatory No. 160

Yes.

Interrogatory No. 163

With reference to the letter or memorandum that appears at page 29 of the defendant's answers to certain interrogatories, it appears to be signed by the initials "W.E.K." Whose initials are "W.E.K."?

Answer to Interrogatory No. 163

W. E. Kraybill, one of Crystal's officers shown in the answer to Interrogatory 1 (original number).

Interrogatory No. 166

The contracts between Crystal and growers of sugar beets during the cropping years 1939, 1940 and 1941 for Northern California provided that the price to be paid the grower should be determined by a formula in which one of the variables was the net return received for sugar by all the manufacturers of sugar beets in Northern California. The contracts between Crystal and growers of sugar beets in Southern California, Exhibits 14, 15, 16, 17, 18 and 19 provided for payment to the growers by a formula in which one of the variables was the net return received for sugar "by the four southernmost beet sugar companies in Southern California." Were there any beet sugar factories manufacturing sugar from sugar beets in California during the cropping years 1939, 1940 and 1941 other than the four southernmost [73] beet sugar companies in Southern California referred to in Exhibits 14 to

19 inclusive and the sugar beet companies operating in Northern California?

Answer to Interrogatory No. 166

As explained in the answer to Interrogatory 147 (original number) there were only three beet sugar factories in Southern California which manufactured sugar from sugar beets during the cropping years 1939, 1940 and 1941. Those three factories and the factories operating in "Northern California" were the only beet sugar factories manufacturing sugar from sugar beets in California during the designated years.

Interrogatory No. 53—Evans

Were any beets produced by plaintiff during the cropping year 1941 and delivered to American Crystal Sugar Company shipped by said company to its sugar factory at Oxnard, California, and there manufactured into sugar?

Answer to Interrogatory No. 53—Evans

Yes.

Interrogatory No. 54—Evans

If your answer to the preceding interrogatory is in the affirmative, state the quantity of plaintiff's beets that were so shipped.

Answer to Interrogatory No. 54—Evans

Upon delivery of beets by the plaintiff, such beets were loaded onto barges with beets of other growers and at [74] once lost identity as plaintiff's beets; and even if beet dump weights were available, we still could not determine at this time which of said

beets were shipped to Crystal's Oxnard factory and which to the Clarksburg factory.

Interrogatory No. 55—Evans

If your answer to Interrogatory No. 8 (original number) was in the affirmative, state whether the sales of sugar manufactured from said beets (i.e., the beets produced by plaintiff and manufactured into sugar at defendant's Oxnard factory) were included in the Southern California sugar sales or in the northern California sugar sales in determining the price to be paid growers for sugar beets.

Answer to Interrogatory No. 55—Evans

The sales of sugar manufactured from plaintiff's beets shipped to Oxnard for processing were included in Southern California sugar sales. [75]

[Endorsed]: Filed May 4, 1951.

[Title of District Court and Causes No. 4643-8353.]

Los Angeles, California

Monday, March 19, 1951, 11:00 a.m.

The Court: You may proceed.

The Clerk: 4643 and 8353, Mandeville Island Farms and others versus American Crystal Sugar Company.

Mr. Works: We are ready, your Honor.

Mr. Arndt: Ready for the plaintiff.

The Court: How about this question of time, gentlemen? Mr. Arndt has raised the question as to the time element. Mr. Arndt says your motion is too late.

Mr. Arndt: I stated that his motion for a new trial is too late.

The Court: But his motion is to amend the findings.

Mr. Works: There is no motion for a new trial.

Mr. Arndt: A motion to amend the findings was made in time. My position is not supported by affidavits or evidence or anything else.

The Court: I haven't studied this because I haven't had a copy of the findings. What is the citation or what are the findings that are in question here?

Mr. Works: Finding 18-D on page 17, lines 10 to 12.

Your Honor will recall we have gone through four versions of these findings now and have practically cleaned them up with reference to the sugar situation. This is the last reference to sugar in the findings and it appears in the [3] findings as to damages to which it is irrelevant in the first place.

I made this motion because at the last time we discussed these findings your Honor indicated this finding should not be in there and when the findings were signed it was there.

Mr. Arndt: No such thing occurred in my presence. I said I was going to settle them myself. Of course it is true in this case that instead of taking the seeds to the sugar bowl I was only taking them to the refinery and that was the theory upon which I endeavored to hold the findings and let it be covered by the conclusions of law.

Mr. Works: This is the last one on the sugar

situation. We have never taken an exception to your Honor's conclusion of law where the theory is laid out very clearly.

The Court: What portion of it did you make a motion to strike?

Mr. Works: This clause, your Honor:

“If said sugar had been manufactured and sold in interstate commerce in competition with sugar of the co-conspirators, unhampered by said combination and conspiracy——”

That is a left-handed finding.

The Court: I took the position in the trial that we were controlled by the decision of the Supreme Court. I think I remember a request by you for a finding that it did [4] not involve interstate commerce or words to that effect.

Mr. Works: There was no effect upon sugar and your Honor said you wouldn't find either way.

The Court: I made that finding in view of the language of the Supreme Court's decision.

Mr. Works: Your Honor indicated you would not find either way on the question of sugar competition. This is a left-handed finding on that subject.

The Court: Didn't I make a finding to the effect that this dealt entirely with sugar beets within the State of California.

Mr. Arndt: Yes, there is specifically such a finding.

Mr. Works: Yes.

Mr. Arndt: That was one of the things that was added.

Mr. Works: You wanted a finding as to a conspiracy to fix the price of sugar beets when the sugar beets were entirely harvested and processed within the State of California and then manufactured into sugar without crossing state lines.

Mr. Arndt: Has your Honor read my affidavit?

The Court: Yes.

Mr. Arndt: The Zitkowski letter specifically and definitely says that is just what they intend to do. It specifically and definitely says they are going to—they want to stop cut-throat competition in the sale of sugar, [5] and I asked what he meant by that and he said:

“Well, we have to give a discount to certain dealers who are buying sugar from us. We want to stop that.”

That is absolutely uncontradicted, from their own documents, as to the purpose of this conspiracy.

That just can't be brushed aside and ignored. They have offered no explanation of that. They could have brought in someone from the company who could have denied that but they didn't.

He specifically testified that he had in mind the sugar and he specifically testified that it was with reference to cut-throat competition:

“Q. What particular cut-throat competition are you referring to?

“A. Oh, stealing one another's customers.

“Q. You mean by 'customers', growers of beets or just purchasers of sugar?

“A. Purchasers of sugar.”

And then when he spoke about the cross-haul of sugar he specifically testified that meant the sugar and not the beets. In other words this letter specifically ties it into this situation.

The Court: Sugar is like gasoline, counsel. They always maintain the same price wherever they come from; but [6] I have never felt that this conspiracy whereby they fixed the price of beets was a part of a general conspiracy.

Mr. Arndt: But the letter says it was. In other words, the California manager asked the head office:

“What is the purpose of this thing? Why are we adopting this joint method? Why are we all paying the growers the same price”

and here is the answer:

“The principal objective——”

objective of what? Of this joint contract—not a partial objective, but is to obtain,

“as far as this is possible, a higher average net receipt for sugar by avoiding, as much as possible, cut-throat competition, cross-haul of sugar and other similar practices, all of which tend to depress the receipts for sugar and benefit principally the transportation companies and some of the dealers in sugar to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets.”

Now there they set forth the principal objectives to be obtained.

The Court: Well, wouldn't this be true? If they were able to stop cut-throat competition in the sale of sugar wouldn't that inure to the benefit of the grower under [7] ordinary circumstances?

Mr. Arndt: If they had not combined with others regarding the freight. In other words what happened here as shown by the figures I have presented as to the freight, as soon as this conspiracy started the freight rates went up and up and up until the last year. As soon as the conspiracy was over they dropped again. In other words, they were avoiding the cross-haul and doing the various things they are alleged to have done while determining where the sugar was to go.

The Court: That was one of the basic theories upon which I fixed damages. I felt the increase in freight rates was primarily due to the heavy crops.

Mr. Arndt: But the other companies had the same heavy crops therefore they should have had the same increase if there hadn't been some outside motive involved. In other words, the fact that their rates went up to the other companies and practically reached them shows that wasn't the situation. It couldn't have been.

Mr. Works: Your Honor recall the testimony of the two sales managers. Mr. Arndt has been talking about the objective sought to be attained. The undisputed evidence was that assuming such an objective, it never was attained.

The Court: If you think I can recall all of that testimony you are flattering me. [8]

Mr. Works: That is why I am reading it to you. I have it right here. Mr. Hayden was asked:

“Will you please state whether or not the fact that during 1939, 1940 and 1941 these growers were being paid on a joint net basis had any fact whatever on either the price or the supply or competitive condition with reference to sugar?”

His answer was:

“No, sir.”

“Q. When did you first know that the method of paying growers in the Clarksburg district had changed from the net of Clarksburg alone to the joint Holly-Spreckels and Crystal?”

“A. Well, it was some time in recent years, since this litigation started. I didn’t know prior to that time.”

The Court: That is the best kind of evidence you can have, counsel—he didn’t know and there was no change in his methods.”

Mr. Works: Now Hardy. Hardy was the western sales manager:

“Q. From your experience is it or is it not a fact that this situation where the beet growers were paid on a joint net during 1939, 1940 and 1941 had no effect whatever on either price or supply or competitive condition with reference to sugar? [9]

“A. As a matter of fact I didn’t know it was in effect.

“Q. The joint net? “A. No.

“Q. Now, did the utilization of this joint net during those years, as far as you were able to

observe, bring about any change whatever in your territory either in marketing method or efficiency in the sale of sugar, so no matter what the objectives may have been they were not attained?

“A. There was no change whatever either in the efficiency of the marketing method or the price of sugar or in any factor affecting sugar.”

Mr. Works: As your Honor just observed, if the conspiracy had attained the objectives related by Mr. Arndt it would have been to the benefit of the growers themselves because it would have eliminated cost items which it didn't do. That is the whole complaint, that the cost increased rather than decreased.

Mr. Arndt: If the court please, the testimony that counsel has read leaves out most of it. The California representative testified he had nothing to do with the shipment or sales outside of this territory; that the sales were made by the president. That every sale outside of this territory, the first thing he knew about it, was when he received a copy of the report from Denver that it had been made. It was [10] the president who handled all sales outside of this territory. It was the president who handled everything that involved this increase of freight rates. It was the president who took part in all of that.

They didn't put the president on the stand. They brought these men on the stand who knew nothing at all about the situation, who knew nothing about the agreement and who took orders from the president, but the president who alone could have told us what the situation was wasn't produced.

Mr. Works: He gave his deposition.

The Court: I felt that the conspiracy between the refineries had as its real objective the control of the growers and to prevent them from dealing with the refineries that he may have wanted to deal with. In other words, that it more or less limited the grower to the place where he could sell beets and prevented any competition in that respect; but I didn't feel that it had any effect upon the price of sugar in interstate commerce. That is the reason I put everything in my conclusions of law. I assumed that the Supreme Court by its decision, meant "as quickly as you touch sugar you touch interstate commerce." And I still think that is what they intended to say.

I think I mentioned before that as soon as you start to build an oil well you are in interstate commerce whether you hit a dry hole or not. [11]

Mr. Arndt: There is another point involved, if the court please. I feel the court can't under any circumstances—can't grant this motion. It is improperly made. There is not the slightest bit of support for it. There are no affidavits. There is nothing. They just come in and make a motion and say that these findings were improperly made or inadvertently made.

The Court: You will notice in the original I have indicated a question which I hadn't caught before.

Mr. Works: That is right.

The Court: I notice there is a question mark opposite this which is in my handwriting.

Frankly I am trying to make these findings in

order to get a direct ruling from the court on the question of whether sugar and oil are in the same category. You will remember I cut out interstate commerce wherever I could find it.

Mr. Arndt: That was on the basis, as I understood it, that it was a conclusion and not a statement of fact.

The Court: I am not making a finding of fact. If I had made a finding at all I would have made a finding that it did not affect interstate commerce, but I wouldn't do that in view of the Supreme Court's decision.

Mr. Works: We would have been very happy if your Honor had.

The Court: I know you would have been but I couldn't [12] do it in view of the Supreme Court decision.

Mr. Works: Well, the Supreme Court held that a restraint upon sugar had been alleged and it is our position now and will be that that has not been proven. That is the differentiation. But in any event these findings have been cleared upon the interstate commerce situation every place except this one clause and that is all we are asking to have removed. We want it to be consistent with the other findings which your Honor has made.

The Court: And I feel it is inconsistent with the other findings.

Mr. Works: And that is why we make the motion.

Mr. Arndt: I think to ignore this letter in which they give their own explanation of what they are

doing is to commit error. They were the ones who could have explained that letter and they didn't.

Mr. Works: I think I have been very patient throughout this whole case, but your Honor will recall we were ensnared on that first appeal by a situation where we understood and I think your Honor understood—I know I did, that all that was alleged in that complaint——

The Court: Where I made a mistake was not trying the case first.

Mr. Works: That is true.

The Court: I thought I was doing you a favor but instead [13] I have made a lot of extra work.

Mr. Works: I certainly don't want the same situation to happen on this forthcoming appeal that happened on the last one. If this is left in here there will be an argument that your Honor found there was a restraint of competition upon sugar, the interstate product, precisely the same thing that the Supreme Court was dealing with on the first appeal. I don't want to get caught off base again.

The Court: I wouldn't be surprised if the court sends this case back for a specific finding of fact on the sugar, but I have felt I should not do that in view of the Supreme Court's decision.

I viewed that as quite a broad decision. It took in a lot of territory.

Mr. Works: Yes, I think so, too.

The Court: And I personally don't think you are going to get any place on your appeal and that the Supreme Court will hold as I stated before, that sugar is a commodity in interstate commerce—you

can't play with sugar without playing with interstate commerce. If I were to rule on the question that would be my ruling. I am going to grant the motion.

Mr. Works: Thank you, your Honor.

Mr. Arndt: I don't know whether this is a matter that is automatically excepted to or not. This is an unusual motion and therefore may I have an exception? [14]

The Court: Certainly. You will draw the order.

Mr. Works: Yes, your Honor. I will prepare an order and submit it to Mr. Arndt for his approval as to form.

The Court: All right.

(Whereupon the above-entitled proceedings were concluded.) [15]

[Endorsed]: Filed May 16, 1951.

[Endorsed]: No. 12946. United States Court of Appeals for the Ninth Circuit. American Crystal Sugar Company, a corporation, Appellant, vs. Mandeville Island Farms, Inc., a corporation, Roscoe C. Zuckerman and G. K. Evans, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12946

AMERICAN CRYSTAL SUGAR COMPANY, a
corporation,

Appellant,

vs.

MANDEVILLE ISLAND FARMS, INC., a cor-
poration, ROSCOE C. ZUCKERMAN and G.
K. EVANS,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT AMERICAN CRYSTAL
SUGAR COMPANY INTENDS TO RELY
UPON THE APPEAL

Appellant above named respectfully submits the following points upon which it intends to rely upon the appeal, to wit:

I. The District Court Erred in Rendering Judgment for Appellees and Against Appellant.

(A) The District Court erred in holding and deciding that the decision of the Supreme Court on the prior appeal in *Mandeville Island Farms, Inc., vs. American Crystal Sugar Company* (334 U. S. 219) relieved appellees of the necessity of proving (as distinguished from alleging) that the activities complained of had a substantial economic effect upon interstate commerce.

1. The holding on the prior appeal was that the Mandeville amended complaint stated a cause of action under the Sherman Act; it in no way dispensed with the necessity of proving such cause of action.

(B) The conclusions of law and judgment against appellant are not supported by the findings.

1. In order to warrant a recovery in a treble damage suit under the Sherman Act, a plaintiff must plead and prove, and the trial court must find, that the activities complained of as having caused him damage, had a substantial economic effect upon interstate commerce.

2. The District Court here declined to make any finding whatever as to the issue of effect upon interstate commerce; and it repeatedly eliminated or deleted findings proposed by appellees as to that issue.

3. If the District Court had found that the activities complained of had a substantial economic effect up interstate commerce, such findings would have been clearly erroneous as being contrary to the undisputed evidence.

(a) The undisputed evidence was that the activities complained of had no effect whatever upon the price, supply or competitive conditions with reference to sugar; the only interstate product involved in the case.

II. The District Court Erred in Awarding Damages in the Amounts Specified in the Judgment.

(A) The District Court erred in its application of the measure of damages.

1. The measure of damages is the difference between the amounts actually realized by appellees, during the three crop years involved, from the sale of their beets to appellant, and what would have been realized by them during such period in the absence of the combination complained of.

2. Translated to the facts of this case, and assuming, for purposes of discussion only, that injury from a Sherman Act violation was both proved and found, the proper measure is the excess, if any, and as to each of the three years involved, of the amounts which appellees would severally have received had they been paid for their beets upon the basis of appellant's own net return from sugar sold from its Clarksburg factory, over the amounts which they severally did receive when paid upon the basis of the averaged net returns from sugar sold from the Clarksburg factory and two other factories operated by other sugar companies in northern California.

(a) These are not cases where defendant's acts have prevented plaintiffs from making precise proof of their damages; the amount of such damages, ascertained by the measure properly applicable to these cases, was proven to the penny.

(B) The damages actually awarded were speculative and inconsistent.

Dated: This 25th day of May, 1951.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,
/s/ By PIERCE WORKS

LEWIS, GRANT, NEWTON,
DAVIS & HENRY
DONALD S. GRAHAM
Of Counsel.

[Endorsed]: Filed May 28, 1951. Paul P. O'Brien,
Clerk.

